Q. And what family did he have there?

A. Well, when he first moved on there his youngest daughter and his boy, who was not married at that time, stayed with him, but after they were married, why, he and his wife, Mrs. Reed, were always there.

Q. If they had a home elsewhere—during the time that they have been there do you know whether they had a home elsewhere?

A. They did not—absolutely no.

Q. Do you know what improvements he has upon this land?

A. Yes, sir, just in a general way.

Q. What are they?

A. Well, he has a house, a root house, a barn, woodshed and a toilet. That is in the building line. He has about an acre in cultivation besides some more slashing consisting probably of three or four acres altogether. He has a good trail three quarters of a mile north and south through the place to the south quarter and then a blazed trail across that. He has blackberries, fruit trees and raspberries and a good garden patch. That is all I can think of just now.

Q. He has a trail down across the southwest quarter of the northwest quarter

A. Yes, sir, clear through.

Q. What kind of a trail is that?

A. That is a good trail for what you would call a woods trail in this country. It consists of a trail that you can ride a pony over—if you know what a trail is, and the Court has been long enough in this [fol. 158] country to know what a woods trail is. The trail is a good average trail, and then he has pretty near what you might call a road out from the house down to the river, but this trail is good sledding and more winding.

Q. Did he ever talk to you about this land up there?

A. Oh, yes, a number of times.

Q. Did he ever say anything as to why he was occupying this land?

A. Why——

Mr. Balmer: (Interrupting.) Objected to as hearsay.

The Court: He may answer that by yes or no.

Mr. Balmer: And incompetent, irrelevant and immaterial.

The Court: He may answer by yes, or no.

The Witness: What was the question?

(Witness read as follows: Did he ever say anything as to why he was occupying this land?)

A. Yes, sir.

Q. What did he say?

Mr. Balmer: Just a minute. I object to that question as incompetent, irrelevant and immaterial and calling for hearsay testimony.

Mr. Whitcomb: I want to show that he was holding it under a claim of right.

Mr. Balmer: So far as this is concerned, what the plaintiff told this witness as to his claim of right would not be binding on us and would not be material. It would necessarily be determined by what he did in the way of evidencing his claim of right publicly.

The Court: It looks that way to me.

[fol. 159] Mr. Whitcomb: You may take the witness.

Cross-examination.

By Mr. Balmer:

Q. What 40 are these improvements on that you described?
A. On three 40s. There are on the——
Q. (Interrupting.) With the exception of the trail.
A. With the exception of the trail?
Q. Yes.
A. Why, his improvement is all on the northwest.
Q. Of the northwest?
A. Yes, with the exception of the trail and what he bought.
Q. What he has done, with the exception of the trail, is all down on the northwest quarter of the northwest quarter, isn't that right?
A. No, sir. I consider that when he bought improvements they were his improvements.
Q. Well, it was not what he bought.
A. Well, it was what money bought.
Q. Now, this is my question. What Mr. Reed has put there, with the exception of the trail, is all located on the northwest quarter of the northwest quarter of section 3?
A. Yes, sir.
Q. That is where these buildings are that you described?
A. Yes, sir.
Q. And the acre or so of garden that you spoke of?
A. Yes, sir.
Q. And the slashing?
A. Yes, sir, with the exceptions—no, I will have to go back on [fol. 160] that. Mr. Reed did do a little work upon the middle part.
Q. Which 40 is that?
A. That is the southwest of the northwest. I forgot about that.
Q. When did he do that?
A. Oh, that was two or three years ago. I was up there and he told me—he worked up there one day when I was there, and he told me that he was going to plant raspberries, but I could not swear whether he did or not.
Q. That was two or three years ago?
A. Yes, or three or four years ago, something like that. I would not say exactly.
Q. You first was on this land in 1909—in the fall of 1909?
A. Yes, sir.
Q. How often have you been on it since?

A. Oh, several times. I would not say, because I have been there probably on an average once a year—once a year that I and my wife would go up there.

Q. Were you married to his daughter before you went there?

A. Yes, sir.

Q. And you visited them about once a year?

A. Probably so, or oftener. My wife has been up there oftener.

Q. They were living there when you visited them?

A. Oh, absolutely.

Q. What time of the year was it?

A. Well, it has been at different times of the year that I have been there. As a general rule, when things would go quiet in the fall I have been up there at different times.

Q. What did you do when you would go up there?

[fol. 161] A. What do I do?

Q. Yes.

A. Well, I hunt and I have helped him carry in grub, provisions and just such as that. I don't — up there to work strictly, but I have helped him.

Q. Now, you say that he has practically a road running down toward the river from his cabin—from his house?

A. Yes. I would say yes. I would call it an extraordinarily fine trail that I could go over with a horse and sled.

Q. Did you ever see a horse and sled go up that trail?

A. No, I have not, but I have had pretty good experience in the woods so that I can gamble with you that I could take a horse and sled over that trail.

Q. You could not take a wheel vehicle up that trail?

A. *On*, no, I would not try that.

Mr. Balmer: That is all.

Redirect examination.

By Mr. Whitcomb:

Q. Mr. Studebaker, did you ever make any measurements to determine the location of the clearing—the place that is slashed and where the cedar tree is cut up on this land?

A. Yes, sir.

Q. Just tell what you did.

A. Why, Mr. Reed was up showing this clearing at one time, where Smithy was, on the other 40, and he said "I am just wondering where it would come in actual measurement,"—whether there was a 40 in between, and he said "Let's go down and measure it." [fol. 162] So we went down to the northwest corner of the 40 and run south and then east and we determined where this 40 was.

Q. And where did you find it to be?

A. We found it to be on the southwest 40. We blazed a tree, which is on there yet.

Mr. Whitcomb: That is all.

Recross-examination.

By Mr. Balmer:

Q. That is the clearing on which Mr. Reed put raspberries on about three or four years ago?
A. I didn't say that he put raspberries on there. That is the place that he told me he would, but I don't know whether he did.
Q. That is the place that he told you that he would put them on?
A. Yes, sir.
Q. You say that you measured that from where?
A. We went to the northwest corner of the section and run south and then east to get the dividing line.
Q. How far south of the line between the southwest and the northwest 40s of section 3 is that clearing?
A. How far south of the south line of the 40?
Q. Yes.
A. Well, I would not swear to feet on that but it is not a great ways.
Q. Yes.
A. I consider it about 95 rods, that is, just as I remember it, from the north line to Mr. Smithy's clearing.
Q. There is no building in that clearing?
[fol. 163] A. No. I think there are some poles cut. I remember the cedar tree, but I would not swear whether there was a foundation laid or not, but I don't believe it. Maybe there was.

Mr. Balmer: That is all.

(Witness excused.)

Mr. Whitcomb: I would like to recall Mr. Tincker.

W. J. TINCKER, a witness on behalf of the plaintiffs, recalled.

Direct examination.

By Mr. Whitcomb:

Q. Mr. Tincker, did you satisfy yourself during the noon recess as to the time when you went to Maple Falls and settled upon the land in question?
A. Yes, sir. I have it right here.
Q. When was it?
A. It was the day that McKiney died, the 14th day of September. The flags were half mast at Mount Vernon when we left there.
Q. And you went to Maple Falls that day?
A. Yes, sir.
Q. And that was in what year?
A. 1901.

The Court: What date was it, you say, in that year?
The Witness: 1901, September 14th he died, according to this book.

[fol. 164] Q. And how long was it after that that you settled on this land?
A. Right away, because my feet were itching to get a claim, and I went right up there afterwards—either September or October—right along there.
Q. Who located you up there?
A. Nobody. I located it myself.

Mr. Whitcomb: That is all.

Cross-examination.

By Mr. Balmer:

Q. You say that you located this claim yourself?
A. Yes, sir. I have been up there at Maple Falls for years and years, and I knew all the country, and, in the first place I had a little experience in surveying. Now, let me tell you something else. My girl is 19 years old. She was seven months and twelve days old when we landed in Maple Falls. I have got that straight.

The Court: You got that from your wife?
The Witness: Yes, sir, you bet. Another thing. There is a record right here in the Court House where I bought land from Mr. King in Maple Falls in 1901; and my wife says she is pretty positive about that too.

Q. Where does your wife live?
A. Where you were at the other day to try to get information.
Q. Where is that?
A. 2638 Xenia Street.
Q. She is out there today, is she?
A. Yes, sir. I could have brought her in if you wanted me to, [fol. 165] but I thought I would save the costs.

Mr. Balmer: That is all.

(Witness excused.)

Charles W. Reed, called as a witness on behalf of the plaintiffs, having been first duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Whitcomb:

Q. Your name is Charles W. Reed?
A. Yes, sir.
Q. And you are the plaintiff in this action?

A. Yes, sir.
Q. Where were you born?
A. In Illinois.
Q. When?
A. In 1860.
Q. Did you ever take up any Government land?
A. No, sir.
Q. You never claimed any except the land that is in question here in this suit?
A. That is all.
Q. This homestead that we have talked about?
A. Yes, sir.
Q. Where do you live now?
A. I live on my homestead.
Q. What is the description of this homestead that you live on?
[fol. 166] A. Lot four and the southwest one quarter of the northwest one quarter, and the west half of the southwest one quarter.
Q. Of what section?
A. Section 3, township 39, six east.

The Court: Township 39, range six east?
The Witness: Yes, sir.

Q. How long have you lived there?
A. I went to work on that in November, 25th of November, in 1906.
Q. Where had you lived prior to that time?
A. Well, I had lived most of the time with Mr. Fobes. I was working for Mr. Fobes.
Q. Where was that?
A. That was out at Maple Falls, I guess.

The Court: Just up at the lower end of the lake there—Silver Lake?
The Witness: Well, yes. It was further up at that time. He had a small mill over there, just right up across from Caulkin's place, if you know where that is.

Q. Do you know W. J. Tincker?
A. Yes, sir.
Q. When did you first know him?
A. The first I knew him was in June, 1902, when I went to Maple Falls.
Q. And do you know Walter Smithy?
A. Yes, sir.
Q. How long have you known him?
A. I think it was about—I am not positive of the date, but I [fol. 167] think it was in 1906 when I first became acquainted with him—maybe a little earlier than that.
Q. When did you first know anything about this land that you now hold as a homestead?
A. Well, I knew that they claimed a homestead there, but I

didn't know much about it at that time until Smithy got it. I was working and I was not much in the timber, but I knew that they claimed a homestead there.

Q. When did you first have anything to do with this land?

A. November 24, 1906.

Q. And what happened then?

A. I bought Smithy's improvements.

Q. Just what did you do when that transaction took place?

A. Well, we went up there and ran lines around and took down his notices and put mine up.

Q. Did you go clear around the land?

A. Yes, sir; on every part of it.

Q. And you put notices up of your own?

A. Yes, sir.

Mr. Whitcomb: Just mark that for identification, Mr. Reporter.

(Reporter marks document Plaintiffs' Exhibit "A" for Identification.)

Q. I show you plaintiffs' identified exhibit "A", and I will ask you what that is?

A. I don't understand what you mean.

Q. I want to know what this document is.

A. Oh, that is a notice. That is one of the notices.

Q. Who wrote this?

A. I did.

Q. And where did this come from?

[fol. 168] A. It came from the corner post.

Q. And who put it on the corner post?

A. I did.

Q. This is one of the notices that you speak of as being posted on the claim?

A. Yes, sir.

Q. You had similar notices posted on all the four corners of the claim?

A. Yes, sir.

Q. Had you?

A. Yes, sir.

Mr. Balmer: Which corner post did this come from?

The Witness: It came from the quarter post on the north line, up about half a mile. That was posted there.

Q. Have you at all times kept such notices posted on this land?

A. Yes, sir.

Q. Since you have been on there?

A. Yes, sir, continually.

Mr. Whitcomb: We will of-er this notice in evidence.

The Court: Any objection.

Mr. Balmer: I object to it as incompetent, irrelevant and immaterial.

The Court: Let it go into the record.
Mr. Balmer: Exception.

(Whereupon notice referred to, previously marked as Plaintiffs' Exhibit "A" for Identification, was admitted in evidence and marked Plaintiffs' Exhibit "A").

Q. When you purchased Mr. Smithy's rights did he give you a written document?
[fol. 169] A. Yes, sir. We went to a notary up there when that was made. Judge Broyles made that out, and I kept this for years but it got misplaced.
Q. Have you searched for it?
A. All my papers over.
Q. Can you find it?
A. No, I have not been able to, yet. I may find it yet.
Q. Do you know what it contained?
A. Well——

The Court (interrupting): You can answer that by yes or no.

A. Yes.
Q. What did it contain?
A. Well, it contained——

Mr. Balmer (interrupting): Objected to as not calling for the best evidence and no proper foundation having been laid, and, further, it is incompetent, irrelevant and immaterial.
The Court: He says that he has lost or misplaced it. If that is the case you can prove it by secondary evidence, or its contents. But it might have been placed on record.

Q. Has it been placed on record?
A. No, sir, it has not been placed on record. I had the notary's seal on it, but that was all.

Mr. Whitcomb: I think, your Honor, he has shown that it is lost. He says that he searched for it and he could not find it. Under those circumstances, where it cannot be produced and he cannot find it, he certainly is entitled to testify if he says that he knows what it contains.
Mr. Balmer: I will withdraw the objection as to the method of proof, saving the objection as to its competency and relevancy.
[fol. 170] The Court: Go ahead.
Mr. Balmer: Exception.

Q. Answer the question then.
A. Why, it contained this: it showed that I had purchased all of Smithy's improvements and his rights to this land, and that he relinquished all of his improvements and rights.
Q. Did it contain a description of the land?
A. Yes, it contained a description of the land. It described lot

four, the southwest of the northwest one quarter and the northwest of the northwest one quarter, just the same as that notice.

Q. After you had purchased the land from Smithy, what did you do?

A. Well, I went right on it to work. I worked on it.

Q. What work did you do?

A. Why, I commenced clearing. I took a man up there with me and went to splitting out shakes and building a cabin right at once.

Q. And did you continue that?

A. Yes, sir.

Q. For how long?

A. Well, I got this house so that I could stay in it myself, but the snow got deep and I could not get my family there until towards spring—about March—and I stayed there almost all of the winter—that is, not all of the time but most of the time. I worked there when the weather was so that I could. I had the house completed so that I could put stuff in it—not to live in but for storing stuff in there—in the middle of December. I was storing it myself in there [fol. 171] all the time that I could carry it up.

Q. When did you get your family in there?

A. About the first of March, as well as I could remember, when the snow got down so that we could get in.

Q. Where have you and your family lived since that time?

A. Continually since that time on that place. That was the only home that we have had. We have stopped out a little, just like anybody else would, but when we are home we have not got anything else but that place.

Q. Do you live there now?

A. Yes, sir. I have got spuds and a garden there. I have got twelve pear trees there.

Mr. Balmer: In bloom?

The Witness: Yes, sir. If you will go up there you will find them. I have set cherry trees, and they have been bearing for three years.

Q. How much of a house have you got there?

A. Well, I have got a house with a lean-to on the porch. I suppose the house itself is ten by twenty, I think, and I have got two rooms with two small bedrooms upstairs, and then I have got a kitchen and a dining room and then I have got this porch in front of the building.

Q. What other buildings have you?

A. A woodshed, tool house and root house and a barn for my horse. I have hauled up my stuff in there for the last three years by that horse and sled. Sometimes I have packed it on the horse and sometimes on the horse and sled on that trail.

Q. What other improvements have you got?

[fol. 172] A. Well, I have a trail to Maple Falls and one to Warnick, and then I have got a trail graded clean up through my claim to the third 40, and it is blazed all clean through. I didn't grade it all the way. I cut the logs out and graded up that far.

Q. Are the boundaries marked of your claim?

A. Yes, sir. They are marked on the east. I have done that myself. I have run a compass and measured it on the east and marked the east boundary line. The section line is on the west, and on the north and on the south.

Q. And that is marked, is it?

A. Sure it is. Yes, sir.

Q. Has any one else been in possession of this land since you went on there?

A. No, sir.

Q. Has anybody else, so far as you know, been on the land?

A. What do you mean? Lived on it?

Q. Well, yes. If anybody was on there, what were they on there for, if you know?

A. Oh, there was a homestead filed on the southwest one quarter. John Carlson filed a homestead there at the same time that I did, and Parrott filed a timber claim against both of us—Henry Parrott of Bellingham.

Q. That is, on the southwest quarter of section 3?

A. Yes, sir.

Q. Has anyone, besides these contestants that you think may have been on the land, so far as you know, asserted any claim to it?

A. No. Well, the state—may I be allowed to go ahead with my statement?

[fol. 173] Q. Yes; go ahead.

A. The state cruiser and examiner were in there in the spring of 1907. They stayed all night with me and went out and cruised the next day and came back and got their supper and went out—or dinner rather.

The Court: And they cruised where?

The Witness: Sir?

The Court: And they cruised where?

The Witness: Cruised back of my claim. I suppose they cruised mine too. The state selected it at that time and so, I suppose, they must have cruised it.

Q. You subsequently had contests with Carlson and Parrott and with the state with regard to this land, did you not?

A. Yes, sir.

Q. And what was the result of these contests?

Mr. Balmer: Objected to as incompetent, irrelevant and immaterial, and not calling for the best evidence.

The Court: It is not the best evidence.

Mr. Balmer: I cannot see its relevancy.

Mr. Whitcomb: Well, they are all here, part of the record. I do not care. He mentioned it. It was not responsive, really, to the question, and I thought that this was an easy way of disposing of it, to show what was the result.

The Court: Why, if he objects, of course you will have to prove it in a formal way.

Mr. Balmer: I cannot see the revelancy of it, and it is not the best evidence, either. It is necessarily uncertain.

Q. Did you ever file on this land as a homestead?
A. I made my application on February 6, 1907 for lot 4 and the southwest of the southwest one quarter—the west half of the [fol. 174] southwest one quarter.

The Court: What was it you filed on?
The Witness: Sir?
The Court: What was it that you filed on? Your application was made for what?
The Witness: My application was made for the entire west half of the west half of section 3.
The Court: Four 40's in a line?
The Witness: Yes, sir.

Q. Where did you make this application?
A. Made it before the Land Officer in Seattle, and before J. Henry Smith.
Q. Who was with you when you made the application?
A. Why, we filed simultaneously there. The whole bunch was there and we held up our hands and we were sworn and then they called out our names.
Q. Were any of your neighbors there?
A. Magner was right there with me.
Q. When you made your application there were you informed by the Registrar or Receiver of the Land Office, or by anyone else that the St. Paul, Minneapolis and Manitoba Railway Company had selected this land, or a portion of it, or made any claim to it?

Mr. Balmer: Just a minute. I object to the question as incompetent, irrelevant and immaterial, not binding upon the defendant, and not calling for the best evidence.
The Court: I think he ought to be permitted to state what the land office told him, if anything, with respect to this matter—what they advised him with respect to this matter.
[fol. 175] The Witness: May I be allowed to make a statement?
The Court: Yes.
Mr. Balmer: Exception. You just answer the question.

A. I went back in an hour and a half after I made my application and presented my application to Smith, and I asked him if I could get my filings—if I could get a certificate on the land. So he questioned me. He told everybody that they could not get any information there until two o'clock.

Mr. Balmer: What is that?
The Witness: He told me that he had notified the people that they could not get any information until two o'clock that same day, 1907, February 6th. Poole, the clerk that was in there, I got pretty well acquainted with him, and he said, "We can give him his now. It is already made out." He laid the records out before me and he

pointed it out to me and he said, "No, we cannot do that either, because John Carlson has made application for the entire southwest one-quarter, just the same as you have," and he says, "That conflicts you on the back 80." That is the way it was.

Q. Did you see the tract book in the land office at that time, Mr. Reed?

A. He pointed it out to me. I looked at it right there, right with him. He pointed it out right there.

Q. Was there at that time on that tract book any record of the railroad company having filed a selection of this piece of land?

Mr. Balmer: Just a minute. I object to that as not calling for the best evidence, and incompetent, irrelevant and immaterial.

[fol. 176] The Court: If he saw the record?

Mr. Balmer: Well, the record itself, your Honor, is certainly the best evidence. Copies of it can be obtained.

The Court: Yes, but there might have been nothing on the record then and it might have been placed on it subsequently.

Mr. Balmer: But the record certainly ought to be introduced as the foundation of any such evidence, and then if the record went counter to what the witness testifies, he could testify in rebuttal that there has been a modification in the record, but the presumption certainly is not that there has been any change in the record.

The Court: The presumption is that the officer did his duty.

Mr. Whitcomb: Well, we will just have this marked for identification.

(Document marked Plaintiffs' Exhibit "B" for identification.)

The Witness: Shall I answer that question?

Mr. Whitcomb: Just a minute. I want to put something else in here first. I wish to offer in evidence, your Honor, plaintiffs' identified exhibit "B", which is a transcript of the tract book and contest docket, and of the entries in the tract book record or tract record and in the homestead contest docket and selection list number 43 of the St. Paul, Minneapolis and Manitoba Railway Company; the certificate of the land office in regard thereto; supplemental list number 43 of the same railway company and the certificate of the land office in regard to the supplemental list; several rulings of the department of the Interior and the land office in regard to contests [fol. 177] and *and* proceedings with relation to Mr. Reed's homestead claim.

The Court: Any objection to the offer of this exhibit?

Mr. Balmer: I had an understanding with Mr. Whitcomb that I would not object to the form of the certificate, and so I have no objection on that score, but I object to all of the evidence as incompetent, irrelevant and immaterial.

The Court: These are matters and things pertaining to your actions with respect to this property, in the securing of it, if you got it.

Mr. Balmer: Also with respect to Mr. Reed's application.

The Court: Where he had a row with you, so to speak?

Mr. Balmer: Yes.

The Court: I think it ought to go into the record. There is no objection, I understand, to the form of the certificate.

Mr. Balmer: No.

Mr. Whitcomb: The certificate is not under seal. That is what is the matter with the certificate. It is certified and signed, but it is not sealed. Then will it be admitted?

The Court: Yes.

Mr. Balmer: Exception.

(Whereupon documents referred to were admitted in evidence and marked Plaintiffs' Exhibit "B".)

Mr. Whitcomb: The first document in this exhibit "B" is a photograph of the tract record of the Seattle Land Office.

The Court: What date does that purport to be?

Mr. Whitcomb: Well, your Honor, that is kind of hard to tell. This is certified in 1911—certified the 15th day of February, 1916.

The Court: It is supposed to show what had been done up to that [fol. 178] time then?

Mr. Balmer: I don't admit the completeness of the record.

Mr. Whitcomb: I understand that you do not admit that it is complete. I do not know of anything material that is missing there. If there is anything material that is missing, we would be glad to have it in there.

Mr. Balmer: It would take an actual comparison with the records of the Land Office to determine whether anything material has been left out. You cannot do it off-hand.

Mr. Whitcomb: Now, may it please the Court, to revert to the question that I asked Mr. Reed before I offered this exhibit. It is our contention and the purpose of asking this question is, to show that while that tract book shows the filing of that list, as the tract book exists now, there was no such showing and no such record at the time that Mr. Reed made his filing, and that was the purpose of asking the question of Mr. Reed.

Mr. Balmer: I object to any such evidence as tending to impeach an official document and record of the government of the United States, to which the presumption of good faith and credit attaches. It is not the best evidence and it is incompetent, irrelevant and immaterial.

The Court: It is not rebuttable, is it?

Mr. Balmer: It seems to me it is certainly not rebuttable for any individual who may have gone the Land Office and looked at the record there some 13 or 14 years prior to the time that it was introduced in evidence.

The Court: That would be a question of the weight of the evidence. There is nothing to indicate when this data went on, is there—what year?

[fol. 179] Mr. Whitcomb: I don't remember of anything of that kind being on there, as far as that is concerned. I have looked at it very carefully a good many times.

The Court: I wonder what this is in parenthesis here (indicating on one of the documents of Plaintiffs' Exhibit "B").

Mr. Whitcomb: That is a record there. "3/9/09. A. C. McDonald, 403 Sullivan Building, Seattle, Washington."

Q. Who was A. C. McDonald?

A. I had him do some work for me when the state selected that land.

The Court: What is this now (indicating on one of the documents of Plaintiffs' Exhibit "B")?

Mr. Whitcomb: This is the date of his filing, I take it. That says "2/6/07."

Q. That is the date you filed?

A. How?

Q. That is the date you filed, February 6, 1907?

A. Yes, sir. That is the day when it was open for entry.

Mr. Whitcomb: Now, that November, 1913, there (indicating) has reference to the time when the matter was before the Land Office.

The Court: This has got 0/14/17, it looks like (indicating). What is that?

Mr. Whitcomb: I think I can tell you what it is. That is the number of his receipt—that is the number that his claim goes by.

The Court: It is contested on a certain date there, is it not (indicating)?

Mr. Whitcomb: "Contest 4/27/07 by Henry W. Parrott," and [fol. 180] "Henry W. Parrott" is written in with a lead pencil.

The Court: Yes, but that is very dim. There is something about a case—"contest 37 something" it looks like.

Mr Whitcomb: The case number and the list sheet, if we can make them out. That is absolutely illegible.

The Court: You would have to have a glass to make that out.

Mr. Whitcomb: I am sorry that we have not the original document here, but there is no way of getting it.

The Court: Now, where is there anything about the railroad company?

Mr. Whitcomb: Right there (indicating). It says "Lot 1 and the southwest northwest 39-6-3, list No. 43, St. Paul, M. & M. Railway Company, filed May 5, 1902."

The Court: Is that a "2"?

Mr. Whitcomb: Yes, sir.

The Court: And he went down there in 1907?

Mr Whitcomb: Yes, February 6, 1907.

The Court: That is "2/6/07" (indicating), isn't it?

Mr. Whitcomb: Yes, sir, February, 1907.

The Court: That is the date of the application for the land, as I understand it, by this claimant.

Mr. Whitcomb: Yes, sir.

The Court: Now you may proceed. You have a question that you want a ruling on, I understand.

Mr. Whitcomb: Yes. Better have the question read.

(Question read as follows: Was there at that time on that tract book any record of the railroad company having filed a selection of this piece of land?)

Mr. Balmer: In addition to the objection previously made, I [fol. 181] want to suggest this point, your Honor; that this is tantamount to an effort by counsel for the plaintiffs to impeach evidence which he himself has offered, and that the effort to impeach it comes without any warning at all to the defendant. If counsel had tendered upon the witness stand a witness, he would not be permitted to impeach the testimony of that witness. Now he comes into Court with a record, and an official record of the Government at that, introduces it as evidence as part of his case, and then inquires of the witness on the witness stand whether it is a correct record or not. I submit that the testimony is improper and it is incompetent. It is not the best evidence, and if any question is to be raised as to the regularity of this record, the witness to testify to that ought to be the custodian of the record and the party who made the record.

Mr. Whitcomb: It is the position of the plaintiff in this case, may it please the Court, that this patent obtained by the railroad company was obtained by means of an affidavit—I dislike to say that it was fraudulent, but so far as the effect of it goes it was fraudulent. It was not true, and the patent was issued certainly by mistake of the Land Office in regard to the facts and without hearing and without notice to this plaintiff and he was deprived of his land, and his good faith in claiming this land throughout this time and making his application for patent and the reception of his application by the Government without notice to him that there was any conflict, and notice that comes to him some time afterwards that he was in conflict, that there was a prior filing by the railway company, certainly are things that are most material to us, and so [fol. 182] far as the impeachment of that record goes, certainly this cannot be considered as an impeachment of that. We are not undertaking to impeach the record, but if they had a witness that had testified here, we would have a right to show by another witness that the fact was otherwise. We would not impeach the witness by proving that the witness was a liar, but we would prove that the fact was otherwise than what the witness said. Furthermore, the document that we have offered here does not prove and does not show that that record was made on the 5th day of May, 1902. It purports to show that there was a filing of that list on the 5th day of May, 1902, but it does not purport to show that that entry was made in that tract book in 1902.

The Court: That is the point I had in mind. Is there anything here to show when that was done?

Mr. Balmer: No. Nor as to when anything else was done at the time. Nothing to show as to the time the entry was made of Mr. Reed's record, of course, but, of course, we assume it was all done. It is indexed. This is an index that is made contemporaneously

with the various documents. We assume that when we go to the Land Office.

Now, Mr. Whitcomb avers that this case is based upon a mistake of fact on the part of the land officers. If it be true that a mistake of fact occurred, and this is one of the points where the land officers erred to the prejudice of Mr. Reed, Mr. Whitcomb should have alleged that fact in his complaint, as he alleged other mistakes that the land officers have made. And yet you will not find in the complaint any allegation to the effect that by mistake or error, or [fol. 183] inadvertence on the part of the land officers they omitted to note on the tract book at the time our supplemental list was filed that it had been filed and in that way they misled Mr. Reed.

The Court: He testified here that he was not advised of any claim by the company. That fact is in here.

Mr. Balmer: Yes.

The Court: I do not care if he testifies that he did not see such a thing, if it was on there, but it strikes me that an impeachment of the record would have to be by clear and convincing evidence, and ought to be after notice to the other side that you intend to do so. That is the way it strikes me. Now, I have been looking at this thing here and this selection by this list number 43 comes three lines above Reed's name and what he was claiming, does it not?

Mr. Balmer: Yes, sir.

The Court: Is that supposed to be dittoes to connect it with the railroad's claims? What is there here to show any railroad company's connection with this particular property down here (indicating).

Mr. Whitcomb: It is the same description. Here is Lot one and the southwest of the northwest. Let us go down to this next one. We find it is John Carlson, and he claims the southwest quarter of the section. That is not this piece.

The Court: No. That would run into two 40s.

Mr. Whitcomb: Then we find that Reed is the next one, and we find here a memorandum, as I read it "Homestead"—"Hd"—I take it that way—"Homestead Lot 4 S.W. N.W. and W. half S.W. quarter [fol. 184] 3-39-6."

The Court: Then what?

Mr. Whitcomb: This list, of course, covers the same. The record would show a conflict right there, as I understand it.

Mr. Balmer: That is the way I understand it.

The Court (looking at record): This, here, indicating) is the southwest quarter of the northwest quarter of 3. That is respecting the record as touching the railroad company, but this down here (indicating) shows nothing in connection with the railroad company.

Mr. Whitcomb: No, but it shows Reed filing for the same land.

The Court: Yes. That would be true, that there was not anything there about the railroad company that he saw.

Mr. Whitcomb: It looks that way, but my question goes further than that, your Honor. He saw this record as to this piece of land

—this section 3—and when he saw this record his idea was that there was nothing there as to this being filed on by the railroad company.

The Court: This is the same description down here as up here (indicating). That is, this includes that (indicating).

Mr. Whitcomb: Yes. We are offering to prove that the book did not show that this had been filed on by the railroad company.

The Court: It is not in connection with Reed's name.

Mr. Balmer: This is from the tract book—a certain page of which is devoted to a certain quantity of land. Everything with reference to that general quantity of land—not merely a quarter section or anything of that kind—appears on this page, and therefore if this [fol. 185] had been on at the time Reed looked at the tract book, that is the page he would look at and that is what he would see.

Mr. Whitcomb: Yes, that is exactly right. You see, we go over and find the rest of the transactions with regard to the same section on this page, whereas this up here (indicating) probably refers to section 4 or section 2. It is another section, I take it, and then this would come in.

The Court: And then 3 comes in and takes in the bottom of this page and the next page?

Mr. Whitcomb: Yes. That is a continuation, on the next page.

The Court: I do not want to crimp the record, or cut out anything here that might be deemed important by any court of review, and I apprehend that this case is heading for some tribunal to review it. I will let this be put into the record, but I do not see where it is competent. I am frank to say that. It is a remarkable thing, you know, without notice to undertake to impeach a record of this kind.

Mr. Balmer: I desire to save an exception, and to give notice at this time of surprise. Of course, we had not contemplated this.

The Court: I am letting it go into the record for the purposes of review. I do not believe I have a right to consider it at this time—at the present state of the record—but if it is deemed important final disposition can be made of it when the case is reviewed.

Mr. Whitcomb: Your Honor, may it go in at this time, subject to their objection to be ruled upon at a later date? I do not want any error in this record. I want everything that we are entitled to.

[fol. 186] The Court: You are offering it to the extent that it may be the subject of review by another tribunal. That is the idea, but I do not believe that the evidence is competent. As I suggested, this is a witness of yours. Now, I do not understand that there is anything vague or uncertain, or anything indefinite, or anything depending on technical terms that needs explanation. Of course, you can always explain terms that are used in an instrument—technical terms, or if it is vague or uncertain you can find out what is meant, or things that are used that have some known definition to certain experts and not to us of the common herd, and things of that kind. The rule lets in evidence of that kind pertaining to a written instrument. I do not see anything here that is vague or uncertain. I understand that you are undertaking to impeach this record by this witness.

Mr. Whitcomb: Oh, no.

The Court: Or, at least, to show that this entry here was made at some subsequent time to the time when he tendered his filing in February, 1907.

Mr. Whitcomb: We want to show that that entry was not made on February 6, 1907; that it was not there.

The Court: I am going to let him testify, but I want to have it in the record also that I do not believe I would be privileged to consider it.

Mr. Balmer: Let it be understood, without reciting the objection, that the evidence is received subject to the objections that have been made.

The Court: Yes, I think so.

Mr. Balmer: And in addition, that a claim of surprise is made [fol. 187] at the introduction of the record, and application will be made for an opportunity to rebut it.

The Court: You have that. Just like the Court said this morning, we will try to get at the very gist of this thing.

Mr. Whitcomb: May it please the Court, our offer is not made for the purpose of impeaching that record.

The Court: Probably my statement is a little broad on that, but you do want to overcome the presumption that the officer did his duty, because the presumption is that he entered it at the time within a few moments after or at the time that it actually happened, and you are seeking now to show that it was not on there in 1907—five years later.

Mr. Balmer: If I am not mistaken, the law requires that the officers of the land office keep this tract book right up to date and that entries should be made in it contemporaneously with the doings of the land office. Enter it just as it is done.

The Court: If they did not there would be a lot of crookedness. If that were done at the time of the transaction, May 5, 1902, it would be five years old at the time your client was down there, offering to file on this homestead. It may have been there and he not have seen it. I had to take a little time to dig the thing out here. I am not a land office lawyer, but I know something about these things and yet I had to have the assistance of you gentlemen to find out whether these different things go back to the same piece of land. I will allow the witness to answer the question.

[fol. 188] Mr. Whitcomb: Read the question.

(Question read as follows: Was there at that time on that tract book any record of the railroad company having filed a selection of this piece of land?)

Mr. Balmer: Objected to on the grounds stated.

The Court: Well, it is going in just for the purpose of having it in the record. The Court here is not considering that as part of this case, for the reasons stated, as I do not believe it is competent, but I do want it in the record for the benefit of the higher court on review—for that purpose if that court should deem it important. If you can show me hereafter that it is competent and relevant, why, all right.

Mr. Whitcomb: You are putting me in a place where I will have to take an exception.

The Court: Of course, you can both do that. You can except to the Court's refusal to consider it.

Mr. Whitcomb: Yes. Note my exception.

Mr. Balmer: And note my exception.

A. At the time that I made my application does that mean?

Q. Yes.

A. No, sir. There was nothing to show. Just as I stated before, the clerk pointed out to me—laid the record down before me and ran over it with me and showed that all that was on that tract book was John Carlson, who had made an application on the southwest one quarter, which contested with me on the south 80, and I said, "Is that all there is against it," and he said "Yes," and he raised the book up, and Mr. Smith suggested to me——

[fol. 189] Mr. Balmer: Just a minute. There is a great deal of testimony that is not responsive to the question. I move to strike out everything beyond the statement made by the witness that this particular entry was not on the tract book when he examined it.

The Court: I guess it would not be responsive, unless it would explain what he said.

Mr. Whitcomb: Probably it is immaterial for any other purpose than showing why he pressed it.

The Court: I do not care if it stays in.

Mr. Balmer: Exception.

Q. Did you know at that time that the railroad company was making any claim to this piece of land?

Mr. Balmer: Objected to as irrelevant and immaterial.

The Court: He may answer that.

Mr. Balmer: Exception.

A. How could I know it? I had two attorneys to examine it——

The Court (interrupting): Do not ask questions. Did you know it?

The Witness: No, I did not know it.

Q. When did you first find out?

A. Well, my first official notice came——

The Court (interrupting): Your first information—when did you get that?

Q. The first information you had.

A. The first information came through lawyers. They claimed that the Northern Pacific was claiming that.

The Court: What is that?

The Witness: That the Northern Pacific was claiming this through Mr. Chapin. He told me that the Northern Pacific claimed three 40s [fol. 190] in the land, and the next man told me that there was a claim and a half on it, and finally when we all got to the records,

on December 1, 1909, that was the first official notice I had from the land office that the railroad was placed on record, and my attorney questioned me. When I went there I took witnesses to have a hearing. He questioned them how they could put railroad scrip on that land with a man living on there and living on there with his family without notifying me. The clerk said "It is done, but we don't know how it is done——"

Mr. Balmer (interrupting): Objected to as incompetent, irrelevant and immaterial and not the best evidence, and not responsive to the question.

The Court: It would not be responsive.

Q. When was this hearing, Mr. Reed?

A. December 1, 1909.

The Court: Let me understand this. What hearing was this, Mr. Whitcomb?

The Witness: It was to determine the rights between me and other conflicting parties?

The Court: Carlson?

The Witness: Well, yes, sir.

The Court: And the railroad?

The Witness: Well, they refused to bring the railroad into it.

The Court: It was between you and Carlson and Parrott?

The Witness: Yes, sir.

Mr. Whitcomb: I think the record of that is right in here.

Mr. Balmer: I think it is.

Mr. Whitcomb: May it please the Court, we will offer the decision [fol. 191] of the Receiver and the Registrar of the Land Office in this contest that Mr. Reed has mentioned, which is the best evidence as to that.

The Court: That is as to Carlson and Parrott?

Mr. Whitcomb: Yes, with Carlson and Parrott, and I want to ask Mr. Reed a question with regard to what transpired at that contest.

Q. What was said at the hearing of this contest on the 1st of December, 1909, in regard to the southwest quarter of the northwest quarter of this section 3?

Mr. Balmer: Objected to as incompetent, irrelevant and immaterial, and not the best evidence. Anything said in 1909 could not be binding upon the defendant railroad company since the land had been patented to it in 1908.

Mr. Whitcomb: We seek to prove, may it please Your Honor, and ought to prove at this time that at the time of this hearing, when Mr. Reed was offering his proof on his application for a patent, that he offered to make proof in regard to the southwest quarter of the northwest quarter, here in controversy, and that he was then informed by Mr. J. Henry Smith, the Registrar of the United States Land Office, that proof would not be received in regard to the southwest quarter of the northwest quarter for the reason that that land

had already been patented to the St. Paul, Minneapolis & Manitoba Railroad Company.

The Court: The southwest of the northwest?

Mr. Whitcomb: That is the piece that is in controversy here.

Mr. Balmer: Now, if Your Honor please, this was a contest involving only the southwest quarter of section 3. The land here in controvery is part of the southwest of the northwest. Now, the [fol. 192] railroad company was not represented at that hearing.

The Court: I do not see how it could be prejudicial anyhow.

Mr. Whitcomb: We will concede that the railroad company was not present at that hearing. It was not present, but we will say this also, in the same connection, that Mr. Reed then demanded that the railroad company be brought in and he be permitted to confront it and contest the question as to whether the railroad company or himself was entitled to the patent to this piece of land, and that he was then informed by the Registrar of the Land Office that the land was already patented to the railroad company, and that they could not be brought in and would not be brought in.

The Court: Well, they were not brought in. That fact remains, does it not?

Mr. Balmer: Yes.

The Court: There is no dispute about that, is there?

Mr. Whitcomb: No.

The Court: And also no dispute about the fact, as I understand the issues in this case, that this railroad company had a patent prior to that time?

Mr. Whitcomb: That is conceded.

Mr. Balmer: Yes, sir.

The Court: Now, as I understand your case, it is based upon a claim or allegation that this railroad company procured this land through fraudulent representations or, at least, through a mistake of fact whereby the affidavit was made that the land was clear of any claims of homesteaders, when, in truth and in fact, it was then [fol. 193] held by a squatter. That is your case, as I understand it.

Mr. Whitcomb: Yes, sir, but we want to go further, to show that the plaintiff has been wronged by the Land Office; that he has been deprived of his rights to this land by reason of the fact that when he demanded a hearing and have the railroad company brought in, the Land Office would not bring it in.

The Court: That may be conceded, but what would that have to do with this case? If the railroad company got this land through fraudulent means and to the detriment of the plaintiff and his predecessors in interest, why, it would be a matter between them to determine that fact before the proper tribunal. We would not be concerned about this other matter unless there was some matter of estoppel, or something of that kind, or laches, and then he could have his explanation after the other fellow has attacked him. His claim of right here is based upon the allegation that the company wrongfully acquired this land through a misrepresentation of fact. That is the case as I see it. Now, it might have some bearing, if it was

a question of first information on his part, but I understand from his evidence that he had knowledge before that particular date—that is, with respect to the company's claim. That is true, isn't it?

Mr. Whitcomb: Yes, sir.

The Court: If this railroad company grabbed this land through perjury and through some wrong, the Court would listen attentively to anything of that kind, because it smacks of crookedness and fraud. Now, it is either that, or they got it fairly. They either [fol. 194] got it fairly, or they got it tainted with fraud, according to this case, and you are undertaking to show that the railroad company acquired it through an affidavit—the basis of the selection—that was false. As I understand the case now, the plaintiff stands in the shoes of these predecessors, Tincker and Smithy. The selection was undoubtedly made before he got into it, was it not?

Mr. Whitcomb: Which?

The Court: The selection by the company.

Mr. Whitcomb: If they made it on the 5th of May, 1902, it certainly was.

The Court: Now, you concede that. Now, another thing occurs to the Court. If there is any practice in the Land Office whereby a list of selected lands may be made up and withheld from the record and brought in at some subsequent date, I would like to know about it. I think the Court would be interested in knowing that in any case.

Mr. Whitcomb: This question that I ask of the witness might be material, furthermore, on the question of his adverse possession of this land—showing his good faith in his claim and his hostility to the claim of the railroad company.

The Court: I understand his claim is that he went there the next day after he bought out Smith's claim and went to work and he has lived there ever since and that he has only been out temporarily, and that he has got it under cultivation. We have that in the record and evidently from the way things are happening around here he is still making a claim to it. I do not see where it would be material at all.

[fol. 195] Mr. Whitcomb: Please note my exception.

Q. Was your claim to the southwest quarter of the northwest quarter rejected by the land office?

Mr. Balmer: Objected to as not calling for the best evidence.

The Court: The record of that possibly would be the best evidence.

Mr. Whitcomb: Well, I guess we have the record right there.

The Court: I guess it is in.

Mr. Balmer: Then the question would be unnecessary.

The Court: I guess so. I have not had a chance to go over that.

Mr. Whitcomb: Here is the decision of the Commissioner of the General Land Office, which contains this: "The homestead application of Charles W. Reed is hereby rejected as to the S. W. ¼, N. W. ¼, Sec. 3, T. 39, North Range 6, East. Said application is here-

with returned, which you will allow after eliminating said S. W. ¼, N. W. ¼ upon the payment of all fees and commission, if not already paid by Charles W. Reed." That is the Commissioner of the Land Office.

The Court: It does not state anything about the grounds of rejection. That is a rejection of the application, is it not?

Mr. Balmer: As to this particular 40.

The Court: It does not involve the question of contest, but refusal to accept the offer of the filing, is that it?

Mr. Balmer: I think I can hardly answer that without reading the whole of the document.

The Court: Well, I will read that in due time, but you think that that thing is part of the record already.

Mr. Whitcomb: It is in here—the certified copy is in evidence. [fol. 196] That is the decision of the Commissioner of the General Land Office. I think you may inquire. I might wish to ask another question later.

The Court: You can recall him if you think of anything.

Mr. Whitcomb: I will ask the witness this question:

Q. Did you ever receive from the Land Office any notice that the Land Office had adjudged the filing of the St. Paul, Minneapolis and Manitoba Railway Company to be prior or superior to yours as to this southwest quarter of the northwest quarter?

Mr. Balmer: Objected to as not calling for the best evidence, and incompetent, irrelevant and immaterial.

Mr. Whitcomb: It is just a question of whether he received notice.

The Court: Well, would not the notice itself tell the story?

Mr. Whitcomb: Suppose there was none? Suppose he says that he received none; that he never was notified by the land office?

The Court: I will let him answer.

Mr. Balmer: That which appears on the record of the Land Office is presumed to be all the records, and therefore the records of the Land Office proceeding would answer this question.

The Court: Well, it might, and then there might be something additional. I will let him answer that.

Mr. Balmer: Exception.

A. I never got any information of that kind until after I had this hearing in 1909. It was after that time that I heard anything of that kind.

Q. That was not through a copy of the ruling of the Land Office? [fol. 197] A. No.

Mr. Balmer: I think that the testimony is incompetent. Any ruling of the Land Office would go to his attorney and not to him. It might be sent out for him, and he never hear of it through the laxity of his attorney.

The Court: I guess that the presumption would attach there in favor of the attorneys, just like in the case of the officers, that they did their duty.

Mr. Whitcomb: You may take the witness, but before doing so I want to offer in evidence this document which has been marked Plaintiffs' Exhibit "C," which is a decision of the First Assistant Secretary of the Interior.

The Court: Any objection to that?

Mr. Whitcomb: On Mr. Reed's petition to have the Government institute suit to vacate patent.

Mr. Balmer: No objection.

The Court: Let it go in.

(Whereupon document referred to admitted in evidence as Plaintiffs' Exhibit "C.")

Cross-examination.

By Mr. Balmer:

Q. Mr. Reed, speaking about these fruit trees you have up there, what 40 are they on?

A. They are on lot four.

Q. That is the northwest of the northwest?

A. Yes, sir.

Q. And the buildings you spoke of are on that same 40?

A. Yes.

Q. Are you living up there now?

[fol. 198] A. Yes, sir.

Q. When did you leave?

A. I left there Saturday—no, Sunday afternoon, three o'clock.

Q. And you have not been there since?

A. No. I have been down here.

Q. That is the reason I did not get to visit with you yesterday?

A. Yes, sir.

Q. Were you up there last October?

A. Yes, sir.

Q. All the time?

A. No. I worked some for my living. I am home every Saturday night and Sunday, almost continually—well, if I am not laboring I am there all the time. I have got to make a living between times.

Q. What work do you do?

A. I work in the logging camps and in the shingle bolt camps and such as that.

Q. Is that the way you have been doing during your occupancy up there?

A. Yes, sir, most of the time. I worked for Knight three years there where I could go backwards and forwards to my home, when he logged off in front of me. That was Knight.

The Court: That is when he had the camp across the river there?

The Witness: Yes, sir. He was in there three years, and I worked for him most of the time.

Q. Do you remember how long ago that was?

[fol. 199] A. It has been four or five years since he moved out—probably four years this fall coming since he moved out of there.

Q. Have you and your family been living up there the last year or two?

A. Yes, sir.

Q. Did your wife live there last winter?

A. Yes, most of the time.

Q. How much of the time was she down at Maple Falls?

A. Oh, she would go down there for a day or two, or something like that, but we never put up any residence down there.

Q. Who did you live with when you were in Maple Falls?

A. Oh, I had a son-in-law down there, and I would go down and stay there a day or two at a time, and then there was an old lady that we have stayed with. There was no hotel there, so we had to hunt some place where we could stay while we were down there. When the hotel was there we stopped in the hotel most of the time.

Q. This notice that you introduced in evidence, from what corner did I understand you to say it was torn down?

A. That was the quarter post on the southwest corner of the southwest one quarter.

Q. Well, that would be the quarter post on the west side of Section 3?

A. Yes, sir.

Q. That is, halfway across the section?

A. Yes, sir.

Mr. Balmer: That is all.

The Court: I want to ask you one question.

The Witness: All right, your Honor.

[fol. 200] Questions by the Court:

Q. Did Mr. Smithy clear off some land there?

A. Did what?

Q. Did Mr. Smithy clear off some land there?

A. Yes, sir. He cleared off this land that was spoke about, on the southwest—on the southwest one quarter, about five rods over the line, that is, the north and south line. We measured it, my son-in-law and me.

Q. Did you ever cultivate that 100 feet square, or something like that?

A. No—well, he cleared that. Oh, I planted about a place 40 feet square with berries. It never done very much good on account there is too much shade.

Questions by Mr. Balmer:

Q. When did you plant those?

A. I planted those about—let me see—in 1908 or 1909 or 10—somewhere along there. I didn't keep no record of it.

Q. What did you say you planted in that clearing of Smithy's?

A. I planted three or four kinds of berries.

Q. What kind?

A. I planted Evergreens and some raspberries I had growing there at the house and some of those blackcap wild raspberries.

Q. Some of the same kind that grow wild on the Nooksack River bottom?

A. Yes, sir. They grow wild right on my homestead, and I planted another kind which did not grow very good up in this clearing of Smithy's.

Q. They would not grow in this clearing of Smithy's?

[fol. 201] A. No, on account of the shade.

Q. Did you hear the testimony of your son-in-law that you were talking about it, about planting them four or five years ago?

A. Yes, I did.

Q. Did you plant them that way, or that time?

A. I guess it was that time.

Q. Did you ever take hold of any of those berries and pull any of them up to see how they were rooted?

A. No, I have not.

Mr. Balmer: That is all.

(Witness excused.)

Mr. Whitcomb: We want to introduce this decision.

Mr. Balmer: I have no objection to its admission for the purpose of explaining the reference of the witness to the contest with Parrott and Carlson, but I do object to it as bearing on the rights of the railway company, in view of the fact that the railway company was not a party and that all this took place subsequent to the time when the railroad company could take any action with reference to this land in view of the fact that patent had already existed.

The Court: If any remedy existed, it was through the Court.

Mr. Balmer: Yes, from that time on.

The Court: I see. Well, it is in the record. I will allow this document to go in.

(Whereupon document referred to was admitted in evidence as Plaintiffs' Exhibit "D.")

[fol. 202] Mr. Whitcomb: We rest.

Plaintiffs rested.

Defendants' Case

Colloquy Between Court and Counsel

Mr. Balmer: I offer in evidence a certified copy of the patent to the Great Northern Railway Company of the land in controversy.

The Court: Any objection to that?

Mr. Whitcomb: No objection.
The Court: Let it go in.

(Whereupon document referred to was admitted in evidence as Defendants' Exhibit "1.")

Mr. Whitcomb: I think the record shows that they are the successors of the St. Paul, Minneapolis and Manitoba Railway Company. It was claimed by them in the case, and I think the pleadings show that the Great Northern succeeded to their interest, and that is their interest in the contest.

Mr. Balmer: The petition so recites. I offer in evidence a section of the United States Geological Survey Map, including the lands in controversy.

Mr. Whitcomb: May I inquire for what purpose?

[fol. 203] Mr. Balmer: Both for the purpose of showing the location of the land and the contour of it as bearing upon its availability for agricultural purposes.

Mr. Whitcomb: So far as showing the location of the land, we have no objection to it, but for the other purpose we object to it as irrelevant and immaterial.

The Court: I do not know what that shows, but generally a map does not show any distinction between land that is on top of a mountain and land that is meadow land. However, we will let it go into the record. We will find out how far the Court ought to consider it when the Court looks it over.

Mr. Balmer: I will say, in connection with that, that the plaintiff in this case must succeed not only upon any weakness that might be found, if any, in the defendants' rights, but upon the strength of his own. Now, to obtain a patent the plaintiff must show that the land is available for agricultural purposes, that being the only purpose for which homesteads are granted. There is some testimony in the record that the land is not suited for agricultural purposes, but that it is timber land. That would have a bearing upon his right to homestead at all, and this evidence is introduced along that point.

The Court: I am not a land lawyer, but all this country in here is timbered. I take judicial knowledge of that fact, and I have also had it impressed on me by clearing some of it. Do you use the term "timber land" in a technical sense—a land suitable for timber and not for agricultural purposes?

Mr. Balmer: Yes.

[fol. 204] The Court: There are quantities of land in this country as we all know and common knowledge of which exists, that are heavily timbered and yet after the timber is taken off fine land for agricultural purposes exist—especially where cedar is concerned.

(Whereupon map referred to was admitted in evidence and marked Defendants' Exhibit 2.)

Mr. Balmer: I will also offer in evidence a certified copy of the record of a suit in the United States District Court for the Western District of Washington, Northern Division, brought by Chas. W.

Reed and Dora Reed, plaintiffs, versus the St. Paul, Minneapolis and Manitoba Railway Company and the Great Northern Railway Company, and Mr. Whitcomb admits that the plaintiffs in that action are the same plaintiffs that appear in this action. Is that not correct?

Mr. Whitcomb: Yes, that is correct. But we object to the introduction of that as incompetent, irrelevant and immaterial. I have not looked at the transcript.

The Court: Do you plead laches?

Mr. Balmer: Yes.

The Court: You have not pleaded res adjudicata?

Mr. Balmer: Yes. We have pleaded both.

Mr. Whitcomb: We object to it as incompetent, irrelevant and immaterial for the reason that it shows in the order of dismissal that is attached to it that the order of the Court is as follows: "Now, therefore, it is ordered that the above-entitled action be, and the same is hereby dismissed, without prejudice and that the defendants have [fol. 205] judgment against the plaintiffs for their costs and disbursements herein,"—for the reason that it was dismissed without prejudice.

The Court: It would not be res adjudicate, but it might have an important bearing on the question of timely action.

Mr. Balmer: Yes, and, furthermore, there are two adjudications in the record before final adjudication sustaining demurrers to the complaints of the plaintiff.

The Court: Presumably, if the Court made the final order that he did, the Court had in mind that there might be an amended complaint.

(Whereupon documents referred to admitted in evidence and marked Defendants' Exhibit 3.)

Mr. Balmer: I will also offer in evidence the record of the United States District Court for the Western District of Washington, Northern Division, in a suit brought by the United States on the Relation of Charles W. Reed, plaintiff against the St. Paul, Minneapolis & Manitoba Railway Company, and I understand that you admit that the Charles W. Reed, upon whose relation that suit was brought, is the same party who is the plaintiff in this case.

Mr. Whitcomb: I don't know anything about —. Will you permit me to look it over?

Mr. Balmer: Yes. That is a suit brought by the government contemporaneously with the suit, the record of which has been introduced in evidence, the purpose of this last suit being to restrain the railroad company from transferring the title pending the determination of the first suit.

Mr. Whitcomb: This is objected upon the same ground, that it is immaterial and irrelevant, because it appears, both from the stipula- [fol. 206] tion of the parties and from the order of the Court dismissing the action that the case was dismissed without prejudice.

The Court: Well, it might have some bearing on the other question which seems to be in issue here, or seems to be raised. It may go in for what it may be worth.

(Whereupon documents referred to were admitted in evidence and marked Defendants' Exhibit "4.")

Mr. Balmer: I have here, your Honor, tax receipts showing payment.

The Court: Have you pleaded the Roth Act?

Mr. Balmer: The seven years' statute?

The Court: Seven years' adverse possession, or something of that kind?

Mr. Balmer: Yes.

The Court: You claim that you had possession of the property?

Mr. Balmer: No. We claim that it was vacant and unoccupied, and we paid the taxes on the southwest quarter of the northwest quarter. These tax receipts cover the payment of taxes——

The Court (interrupting): Any objection to those receipts?

Mr. Whitcomb: I think if Mr. Balmer will just make a statement of the years for which taxes were paid, it will be satisfactory to me.

Mr. Balmer: They cover some additional land.

The Court: You might put into the record the data that you want to.

Mr. Whitcomb: State what years you paid taxes for, and that will be sufficient.

Mr. Balmer: I will state that these receipts show that the Great Northern Railway Company has regularly and punctually paid all [fol. 207] taxes levied and assessed against this property—that is, the southwest quarter of the northwest quarter of section 3, township 39, range 6, for the years 1909 to 1919 inclusive, and I presume I ought to also read in evidence or make a statement to the reporter of the amounts that we paid.

Mr. Whitcomb: Can't you make a statement?

The Court: From 1909 to 1920 inclusive?

Mr. Balmer: 1909 to 1919.

Mr. Whitcomb: If you want to put it in afterwards instead of now, I will consent to that, if it will be of any convenience to you.

Mr. Balmer: All right. I will call Mr. Russell.

David Russell, called as a witness on behalf of the defendants, having been first duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Balmer:

Q. Where do you live, Mr. Russell?

A. At Hamilton, Washington, in Skagit County.

Q. And what occupation do you follow?

A. Timber cruiser.

Q. How long have you been experienced in cruising timber?

A. For the last 20 years.
Q. Last how much?
A. 20 years, or better. 20 or 25 years.
Q. Did you cruise or make an examination at any time for the St. Paul, Minneapolis and Manitoba Railway Company of the land [fol. 208] described as the southwest quarter of the northwest quarter of section 3, township 39, range 6?
A. Yes, sir.

Mr. Whitcomb: We object to this as irrelevant and immaterial.
The Court: I guess this is going into the question of whether thre is timber or whether this is agricultural land down there.
Mr. Balmer: No the question of whether there was any occupancy on it or settlement on it.
The Court: I see. Go ahead.
The Witness: Yes, sir.

Q. When did you make that examination?
A. I think it was in the last of April, I think—I know it was in 1902 and I think it was the last of April, somewheres along, I think, about the 25th. I have not got just the date.
Q. What work were you engaged in at that time—just state what your general job was.
A. At the time?
Q. At the time of examining this land.
A. I was examining the land for the St. Paul, Minneapolis and Manitoba Railway Company. I was sent in there by G. B. Peavey.
Q. You were sent out by G. B. Peavey?
A. Yes, sir. For the St. Paul, Minneapolis and Manitoba Railway Company.
Q. And it was for that purpose that you went over this land?
A. Yes, sir.
Q. How long were you out there on that work at the time that you made this selection of land among others?
[fol. 209] A. How long was I on that work altogether you mean?
Q. Yes.
A. Eight weeks.
Q. Eight weeks?
A. Yes, sir.
Q. When did you go on this land with reference to other land that you examined?
A. Well, sir, this was the piece of land that I went on to when I commenced on this work. This was the first piece of land that I examined.
Q. And do you remember how you went in there?
A. Why, yes. We camped at a log jam about two miles and a half, I think it was, above Maple Falls. We crossed the river on the log jam and went south straight through the woods at the mountain there and picked up the township line.
Q. That is the township line that runs just north of this land?
A. Yes, sir. That is the Township line between 39 and 40, and to get located I traced the line to the corner.

Q. What corner?

A. The section corner, and it was the section corner of 3 and 4, township 39, range 6.

Q. Now, when you found that corner did you look for notices?

A. Yes, sir.

Q. Of a prior claim?

A. Yes, sir.

Q. Did you find any notices posted there?

A. I don't remember of a notice being posted there. I cannot recall it.

[fol. 210] Q. Do you have a fairly distinct recollection of this work?

A. Yes, sir. It was the first claim that I went on to.

Q. You say it was the first claim that you went on to?

A. Yes, sir.

Q. Now, in what direction did you work from the northwest corner of section 3?

A. Well, sir, my recollection is that I worked—that I went east about 20 rods and the compass man, of course, ran the compass, and then we run south until we came opposite the quarter post between three and four and checked up on that. I checked my compass man up to see how he was running, of course, and then, I think, we ran on south two more 40's—I think we did and——

Q. (Interrupting.) That would be down to the southwest corner of 3?

A. Yes, sir, and then we came back through the other side of the 160. It was practically split every 20 acres on a 40.

Q. Did you find any notice at the quarter corner, or at the southwest corner of 3?

A. No, sir.

Q. Were you on the lookout for notices, and cabins and things of that kind?

A. Yes, sir, I was, and particularly for cabins and for notices.

Q. Why were you on the lookout for them?

A. Well, my instructions from Mr. Peavey was to pass up those claims that had cabins on them and to pay no attention in regard to locating on them and to watch for notices on trees.

[fol. 211] Q. You were looking for notices?

A. I was looking for notices and watching particularly for improvements.

Q. If you found any improvements did you select the land?

A. No. I sometimes reported on it. Sometimes I would start in at a section corner, run maybe half a mile one way or the other before I would get to any improvement. Then, in order to show good for my time, why, I would report it. But I would report it just as I found it, cabin or improvement, or if there was a notice there I wrote it down in full and I put it down in my report.

Q. By the way, were you working by the day or by the number of claims you selected?

A. I was working by the day.

Q. You got just as much compensation for a day's work whether you selected one claim or did not select any?

A. Oh, yes, just the same.

Q. As I understand you, in working with your compass men, the compass man would follow the line of the subdivision?

A. Yes, sir.

Q. And you would work in the woods about 20 rods away from him?

A. No. You see, he would go in 20 rods on the section line; like we would commence at the northwest corner of three, we would go 20 rods and then we would run due south. Well, I would figure on estimating 20 rods on each side of him so that when I got across the 40 I had 20 acres estimated.

The Court: As to the timber?

The Witness: Yes, sir, as to what was on the 20 acres. He called a tally every 20 rods, and I determined then what was on the five [fol. 212] acres before I went any further.

Q. And in that way you got an estimate of everything that was on every five acres?

A. Yes, sir. That was the way we figured.

Q. The southwest of the northwest of 3, you selected that?

A. Yes, sir.

Q. Did you find any settler there, or any cabin or anything of that kind?

A. No, sir. I don't think there was an improvement of any kind there.

Q. By the way you made some field notes at the time, didn't you?

A. Yes, sir.

Q. You made some field notes of your examinations?

A. Certainly.

Q. Have you still got those?

A. No, sir. I have let them notes get away from me. I have lost them.

Q. Have you moved?

A. I have moved from about six miles east of Hamilton to Hamilton about ten years ago, and in moving and kind of cleaning up my old papers I think they must have been burned up.

Q. During those two months that you were working at this work of selection, if you came on land that was occupied or on which there were cabins in the possession of parties, did you select that land?

A. No, sir.

Q. Or did you leave that?

A. I left that out.

[fol. 213] Mr. Balmer: That is all.

Cross-examination.

By Mr. Whitcomb:

Q. What time did you say that you went up there, Mr. Russell?
A. The last of April, 1902.
Q. The last of April, 1902?
A. Yes, sir. I cannot testify as to the exact date now.
Q. And you were up there how long?
A. Well, from the time I left home until I got back was just eight weeks to a day. I remember that distinctly.
Q. Where did you spend all that eight weeks?
A. In township 39, Range 6 and Township 38, Range 6.
Q. And where did you stay during that time? Up in the woods all the time?
A. Well, most of the time. We were camped. We were camped all the time excepting about three days that we stopped at Maple Falls.
Q. Was this the first work that you had ever done for the Great Northern?
A. Yes, sir, it was the first work I had ever done.
Q. Your first work?
A. The first work for the Great Northern.
Q. Did you work for any other company—were you working for any other company at that time?
A. At that time?
Q. Yes.
A. No, sir.
Q. Just for that company?
[fol. 214] A. Just for the Great Northern.
Q. And did you locate much land for them up there?
A. Why, I sent in a good many reports, sure.
Q. And did you locate other land in this section 3?
A. Locate other land?
Q. Yes.
A. Only what I ever reported to Mr. Peavey.
Q. Did you locate any other land for the railroad company in Section 3?
A. In Section 3?
Q. Yes.
A. I think I did. I am not quite sure of that now.
Q. What land did you locate?
A. I would have to look over the tracts to see. I don't remember.
Q. Did you make these locations in large bodies, or were they small?
A. Yes. I reported by 40s, and when I did three or four days' work, the first chance I got, why, I mailed them out—I mailed the report out to Mr. Peavey.
Q. Do you know what other 40s you did locate in Section 3?
A. I cannot recall them now.
Q. Did you locate any in section 4?

A. Yes, sir.
Q. What did you locate in section 4?
A. Well, I located the east half of the northeast of section 4, and the northeast of the southeast of sections 4 and 3. That was the first.
Q. That was Mr. Magner's land?
A. I understand so. That was the first report that I made up. [fol. 215] Q. Did you locate any in the southeast quarter of section 3?
A. That I cannot say positively. I cannot say about that now.
Q. Did you locate any in the northwest quarter of section 3?
A. The northwest?
Q. I mean the northeast?
A. I don't think that I did.
Q. You don't think you did?
A. I don't think I did.
Q. Can't you be sure?
A. What?
Q. Would you be sure that you did?
A. No, I would not.
Q. How do you remember so well about this piece?
A. Well, I looked over the plat, and then I was up there the day before yesterday, and it recalled my memory, and I remember distinctly about this piece all right now.
Q. Why didn't you locate the northwest of the northwest of Section 3?
A. Well, I don't remember now but what my judgment is that the northwest of the northwest did not come up to the standard of timber that they required at that time—the description according to Mr. Peavey's instructions that anything that did not reach five hundred thousand feet in fir and cedar alone was not to be taken into consideration, and hemlock was not considered.

The Court: On a 40?
The Witness: Yes, sir, on a 40.
The Court: So many feet to a claim?
The Witness: Yes, sir. It would have to be so many feet to a [fol. 216] claim. Of course, we went 40x40. I take it that that is the reason I left this 40 out.

Q. You preferred, did you not, to get larger tracts than 40 acres in places?
A. Well, it was—I don't know. I reported on everything that I found was 40—whether it was a full claim or whether it was four or five 40s.
Q. Did you have anything to do with this further than making a report?
A. That was all. Nothing further.
Q. Were you ever back up there?
A. Back up there?
Q. Until the other day?

A. Yes, sir. I have been up in that country some time since, yes, sir.

Q. This same property

A. What?

Q. To this same property?

A. No, sir.

Q. This plat shows the northeast of the northeast to the St. Paul, M. & M. Railway?

A. Yes, sir.

Q. This 40 (indicating). Did you locate that?

A. Yes, sir, I expect I did. I expect I did.

Q. How much timber was there on that?

A. Now, I couldn't tell you. My judgment was that it was five hundred thousand of fir and cedar. That was my report at that time.

Q. Which way did you get into that 40? How did you reach that 40?

[fol. 217] A. Here is where I got my location (indicating). I got it from here (indicating). The chances is that I traced this line and got this corner. That is the natural way that I would do it—I would naturally find that corner to know where I was at.

Q. You don't remember just how you did that, however, do you?

A. Well, I figured each 20.

Q. Do you have any definite recollection of that 40 (indicating)?

A. Nothing definite.

Mr. Balmer: You are speaking now of the northeast 40 of 3?

The Witness: Yes, sir.

Q. Now, how much timber was there on Mr. Magner's land down there in section 4?

A. I couldn't tell you now what my judgment on that was.

Q. Do you remember going on that?

A. Yes, sir, I remember of going on that. I remember being on that corner. That was the first corner I went to after I went to work there.

Q. You went on that after you went on section 3, did you?

A. Yes, sir.

Q. Did you go there first or after?

A. I think it was the next day that I went there.

Q. The next day?

A. Yes, sir.

Q. Which way do you say that you went into this land?

A. I went from the river up the mountain and picked up the section line—the township—the north line, 39-6.

Q. Where were you camped?

[fol. 218] A. We were camped about here, somewhere, I should judge (indicating).

Q. On section 28?

A. I think so. There was a big jam in the river that we could cross on. I found out at the time—I found out at Maple Falls about it and I struck out and picked up and got this township line.

Q. About where did you strike the township line?
A. As I remember now we struck the township line somewheres in here (indicating), probably one quarter or three quarters or one quarter from the section corner.
Q. That is, east of the corner?
A. Yes, sir. As I remember it was east of the corner. Anyway we traced the line until we came and got our corners to work from.
Q. And where did you go from there—after you struck it?
A. I told you we worked up through this row of 40s on the west side of 3.
Q. Did you follow a trail up there?
A. No, sir. I didn't see any trail. There was a trail paralleling the river—and old trail, going up and down the river,—but I seen no trail up on the hills there at that time.
Q. You will be positive that there was no trail there?
A. I didn't see any. If there was, I didn't see it. I didn't see it go into the country—not even a blazed trail, not as I remember.
Q. You have been engaged in this same business, have you, ever since that time?
A. I have been cruising ever since for different companies and [fol. 219] different individuals.

Mr. Whitcomb: That is all.

(Witness excused.)

THOMAS THOMPSON, called as a witness on behalf of the defendants, having been first duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Balmer:

Q. State your name?
A. Thomas Thompson.
Q. Where do you live, Mr. Thompson?
A. At Marblemound, Washington.
Q. What is your occupation at the present time?
A. I am a forest ranger.
Q. In what service?
A. In the Department of Agriculture, United States Forestry.
Q. United States Forestry?
A. Yes, sir.
Q. Do you know Dave Russell, who has just testified?
A. Yes, sir.
Q. Did you hear his testimony about the occasion when he was on Section 3, Township 39, Range 6?
A. Yes, sir.
Q. Were you with him at that time?
A. Yes, sir.

Q. When was that?

A. It was in the latter part of April, in 1902.

[fol. 220] Q. In 1902?

A. Yes, sir.

Q. What were you doing with him?

A. I was running a compass for him—compass man.

Q. Describe the work that the two of you were doing? How would you do the work?

A. Well, while I ran the compass I did the pacing—what we call a tally, that is, 320 feet or somewheres near that—and I would call out the tally and he would fix up his notes on the tally, and when he got ready, why, I would go ahead on the same course, whichever way we went from that point.

Q. Was your mode of work designed to let you estimate every five acre tract?

A. Yes. That was the way that it was generally done. It was the way we did it then. We generally split—went through a 40 twice. We went over two tallies, and back down, and that made it twice through a 40.

Q. Had you been doing timber work before this trip you made in there with Russell

A. Well, to a certain extent—not very extensively.

Q. Was this the first time you had worked in the woods with a cruiser on a job of that kind?

A. No, I had been at it before.

Q. That was not the first?

A. No, sir.

Q. Do you have any recollection now of having gone on this Section 3, Township 39, Range 6 with Russell?

A. Yes, I have.

Q. Do you remember how you went in there and about where you [fol. 221] struck that section?

A. The way I remember it so distinctly is because it was the first job on that trip. We went from Maple Falls by way of a team, and we camped on the north side of the river and we crossed on a jam and we went up—we went quartering up along the river, as I remember it, until we struck the township line, and then we followed up to the corner post. There Mr. Russell got his location in that way—his starting point.

Q. Do you remember locating the northwest corner of section 3 then?

A. Yes, sir.

Q. That is, that would be the corner between sections 3 and 4 on the township line.

A. Well, I remember quite distinctly that I blazed the trail out—made the mark with the axe, and he put the notices on—wrote the notices out and the description at the time.

The Court: That is, Russell did?

The Witness: Yes, sir. Russell put that on, but I blazed the trail, though.

Q. Now, did you find any other notices at that corner?
A. No. That is all I noticed.
Q. Now, in what way did Russell put up his notices—was it a paper writing or was it just written on the blaze of the tree?
A. As I remember they were all put on the blaze right near the corner post or quarter corner, whatever it might be. The tree was blazed and the notice was put on with a lead pencil.
[fol. 222] Q. Blue pencil or something like that?
A. I couldn't tell you about that, but it was a pencil that it was put on there with, however.
Q. Do you recollect seeing any notices or any cabins or any improvements of any kind on the southwest quarter of the northwest quarter of section 3 on that trip?
A. No, I do not.
Q. Were you on the lookout for such things?
A. Yes, sir.

Mr. Balmer: That is all.

Cross-examination.

By Mr. Whitcomb:

Q. Whereabouts did you put the notice or the notices on section 3?
A. Well, I remember that we put it right near the corner post. As I said, there was a tree blazed out and a description was prepared on there.
Q. On the corner of the northwest corner—which corner. Did you put the notice on the northwest corner of the northwest quarter?
A. I would not say about that. I know that there was a notice put on there, but I cannot say just exactly whether it was put right at the corner. Possibly it was put right here, at this square corner (indicating).
Q. Where else did you put a notice?
A. Well, there were a good many notices put up at different times at those points—at this point (indicating). I don't just remember because I was just the compass man in there.
[fol. 223] Q. Did you write your name on the notice?
A. No, sir.
Q. What did the notice say?
A. Well, I don't know as I could give you the exact wording of it, but it was that it was located or taken, whichever way it was, for this railroad here—the St. Paul, Minneapolis and Manitoba. I remember that quite distinctly, because that was the first notice for this railroad company.
Q. Did you put a notice on any other 40 in this section?
A. Well, I would not say exactly, because I don't remember it.
Q. You placed notices on all pieces that you located, did you?
A. Yes, where it was customary.

Q. And you were locating this land—you located it for the railway company?

A. Mr. Russell did; I didn't.

Q. You were his compass man?

A. Yes, sir, I was just his compass man.

Q. Which way did you go in when you went on there. I will show you defendants' exhibit "2". Now, about where did you camp when you went from Maple Falls?

A. Well, I cannot say where the camp was. It was an old cabin there, and it took the best part of a half day to get there, and the road was so bad. That is all I know about it.

Q. Now, where did you go—which way did you go up when you left your camp?

A. Well, we went up the river just a little ways, and across on a [fol. 224] jam. We went quartering up the river and across—further up the river from our camp.

Q. Do you remember the road as you went up there—what did you go through when you went there—was it level, or was it rough or smooth, or was there a trail?

A. From the river up?

Q. Yes.

A. No. There was nothing there that I saw. Just this line, that is all (indicating). Just this line, and the ground, as I recall it, was not really level. It was kind of broken land, as I remember it.

Q. Is there a kind of canyon there?

A. Well, I think there is some climb there. I remember the creek runs down—a kind of stream runs through there and it is more or less broken—that is, rolling as I remember the land.

Q. Did you follow the creek?

A. Well, I crossed the creek, I expect, two or three times.

Q. Did you see any trail?

A. No, sir.

Q. Now, are you able to testify that there was not a good trail there?

A. Yes, to this extent that in coming back—we always came back—we came back to the section line and when we came out we always hit the section line further down from where we hit the river—where we branched off and——

Q. (Interrupting). This is quite a while ago. Is your recollection really distinct in regard to this?

A. Well, it is pretty good. There is an old trail right along the edge of the river. There is just a slight trail—not a good trail at [fol. 225] all. It has been blazed out and you can follow it.

Q. Do you remember about the particulars of any other claims up there?

A Oh, I was over a good many there.

Q. What do you remember about Mr. Magner's claim?

Mr. Balmer: I object to that as irrelevant.

Mr. Whitcomb: It is just for the purpose of testing his credibility.

Mr. Balmer: It was not Mr. Magner's claim, anyhow. He was not on there until 1906.

Q. You know what the Magner property is?
A. Well, I was over there. I expect I was over it because I was with Mr. Russell.
[fol. 226] Q. Do you remember how much timber there was on
Q. Did you ever testify about this land before?
A. No, sir.
Q. In any contest or suit?
A. No, sir.
Q. You didn't testify in Mr. Magner's suit in regard to any of this land?
A. No, sir
Q. Mr. Magner had the land, Mr. Thompson, just to the east, in section 4?
A. Yes, sir.
Q. Do you you remember those 40s in section 4?
A. We were there several days, or the most part of a week camping at that place and working over it. I expect we were on there.
Q. Do you remember how much timber there was on any of these pieces?
A. Well——
[fol. 226] Q Do you remember how much timber there was on any of these pieces?
A. No. All I remember is that Mr. Russell's instructions were that they had to run five hundred thousand fir and cedar. I don't think the hemlock was considered at that time. That is just as I remember it.
Q. You have had your memory refreshed in regard to this matter lately, haven't you?
A. No, sir.

The Court: How is that?
The Witness: Not any more than just hearing this case.
The Court: Have you been up there at all?
The Witness: No, sir. I have not been up there since that time, only passing by on the railroad this summer.

Q. Have you talked with any one about this?
A. Well, I don't know. I just heard of the case the other day.
Q. You never talked with Mr. Balmer about it?
A. Well, no, I cannot say that I did.
Q. Well, you have talked with somebody?
A. Well, just slightly, but never before today. I never met the man until today—not until ten o'clock or half past ten when I came in here.
Q. Have you talked with Mr. Snapp about it?
A. No, sir.
Q. Have you talked with anyone connected with the railroad company.

A. I have talked with Mr. Russell and Mr. Hillgoss mentioned it last night.

Q. You talked it over with them?

[fol. 227] A. Well, not any more than just the descriptions of it, that was all. Mr. Russell told me that it was the first piece that we looked at.

Q. Well, you didn't remember that it was the first piece that you looked at until he told you?

A. Well, I did as quick as he told me. I asked him where it was located.

Mr. Whitcomb: That is all.

Redirect examination.

By Mr. Balmer:

Q. At whose request did you come here as a witness? Who asked you to come?

A. I was called by Robert L. Campbell of the Forest Service. He called me.

Q. He is connected with the Forestry Service here at Bellingham?

A. Yes, sir. He is the man that called me.

Q. Did he tell you what the case was about?

A. No. He just said that it was a land case; that was all.

Q. Did you know anything about the case until you got here today?

A. No, sir.

Q. Did I ever talk to you before noon today?

A. No, sir.

Q. Where did I talk to you today?

A. I just met you on the street just a minute there. I was with Mr. McQuire and it was just a minute.

Q. How long did we talk?

A. Well, it could not have been more than a minute at the most.

[fol. 228] Q. On one of the streets here in Bellingham?

A. Yes, sir.

Q. Right near the Leopold Hotel?

A. Yes, sir; near the Leopold Hotel.

Mr. Balmer: That is all.

(Witness excused.)

GARY B. PEAVY, called as a witness on behalf of the defendants, having been first duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Balmer:

Q. Where do you live, Mr. Peavey?

A. Seattle.

Q. What is your occupation?
A. Dealer in timber lands.
Q. How long have you been following that occupation—are you practically a cruiser?
A. I have been at it over 50 years.
Q. And you are cruising timber in the woods?
A. Yes, sir, lumber.
Q. Did you ever select any land or prepare any selection lists of land for the St. Paul, Minneapolis & Manitoba Railway Company?
A. Yes, sir.
Q. At whose request did you do that?
A. Thomas Benton, of St. Paul.
[fol. 229] Q. Thomas R. Benton?
A. Yes, sir.
Q. Do you know what his connection was with the railroad?
A. Their land attorney.
Q. Is Mr. Benton still alive?
A. I don't know.
Q. Have you seen him for a number of years last past?
A. No, I have not.
Q. Have you ever heard whether or not he is dead?
A. I never have.

Mr. Balmer: Would you have any objection to me stating in the record that Mr. Benton is dead?
Mr. Whitcomb: No, no. And I know that he was land attorney.
Mr. Balmer. He has been dead for some two or three years. If he was alive he would be trying this case, and I wish he were alive.

Q. Did you file in the United States Land Office a list of selections for the railway company, including the southwest quarter of the northwest quarter of section 3, township 39, range 6?
A. Yes, sir.
Q. Do you remember when you filed that?
A. The very first of May—the second or third of May.
Q. Of what year?
A. 1902.

The Court: The second or third?
The Witness: The second or third, yes, sir.

Q. Who was your cruiser?
A. David Russell.
Q. The man who has just testified on the witness stand?
[fol. 230] A. Yes, sir.
Q. He was the man you had out in the woods?
A. Yes, sir.
Q. And what did he do in the way of cruising the land and appraising it?
A. Well, he had a compass man to run the lines, and he done the estimating.
Q. He estimated the amount of timber?
A. Yes, sir.

Q. Had you given him any instructions as to whether or not he should select land that was occupied or claimed by homesteaders?
A. Yes, sir.
Q. And what were the instructions in that respect?
A. His instructions were not to interfere with any settler or any new improvements or anything that would indicate that any one else had a claim on the land.
Q. You, yourself, had never seen this land, as I understand it?
A. No, sir.

Mr. Balmer: That is all.

Cross-examination.

By Mr. Whitcomb:

Q. Mr. Benton was not out here himself to look over this land, was he, Mr. Peavey?
A. He was out here a good many times, but I don't remember whether he saw any of this land.

Mr. Whitcomb: That is all.

Mr. Balmer: Was he in Seattle at or about the time that you filed that selection list?
[fol. 231] The Witness: He came there several times. I don't know whether he was there just that date, or not.

Mr. Balmer: That is all.

(Witness excused.)

(Adjournment taken at 5 o'clock to 9:30 the following morning, June 24, 1920.)

June 24, 1920—9.30 o'clock a. m.

Court convened pursuant to adjournment.
All parties present.

William Jasper Hilligoss, called as a witness on behalf of the defendants, having been first duly sworn, was examined and testified as follows:

Direct Examination.

By Mr. Balmer:

Q. State your full name.
A. William Jasper Hilligoss.
Q. What is your age, Mr. Hilligoss?
A. I am 71, past.
Q. What is your occupation?
A. I am chief cruiser and land examiner of the Great Northern Railway.

Q. How long have you been in the business of cruising and examining timber lands?

[fol. 232] A. I went into the Land Department in 1903, and I have been there ever since then.

Q. You have been with the Great Northern Road all that time?

A. Yes, sir.

Q. Prior to that time had you any experience in cruising timber?

A. Yes, sir.

Q. How long?

A. For about four or five years.

Q. Do you keep any diaries or records showing where you go from time to time?

A. Yes, sir.

Q. How long has it been your practice to keep or make those reports?

A. Ever since I have been with the company. I have had to make a report every month.

Q. Have you diaries showing where you have been since 1901?

A. Yes, sir.

Q. Have you those with you?

A. I have got them in my grip there.

Q. Well, will you take them out of the grip so that you can refer to them.

A. All right.

Q. Mr. Hilligoss, are you acquainted with the land which is described as the southwest quarter of the northwest quarter of section 3, township 39, range 6, in this county?

A. Yes, sir.

Q. When were you first on that land?

A. Well, now, I am going to look up my notes. That is the only way I can tell you to be sure. I will take my book. It was [fol. 233] in 1902.

Q. And what time in 1902?

A. I was there the 12th day of August—12th, 13th, 14th and the 15th and left the 16th.

Q. What took you up into that territory?

A. I went up there at the request of the Great Northern Railway, to look over the selection that George B. Peavy had made for the St. Paul, Minneapolis and Manitoba, to see if it would come to the standard for them to take it. It had to be so much timber on it for them to take it—to see if it was O. K.

Q. Did you at that time examine other land besides this?

A. I did. I examined other lands in section 12.

Q. Was it your custom at that time, when you found notices of adverse claims on the land, or cabins, or anything indicating occupancy of the land by any one else than by the railroad, to make a note of it in your record?

A. Yes, sir.

Q. Have you a record book which you made on the occasion of that trip up in that country in August, 1902?

A. I think I have.

Q. Produce it.

A. Yes (producing book). I was on Section 3 in August—it was that time—it was at that time that I was in there—I think it was the 9th. We can tell by looking at the books.

Q. At any rate it was on one of the dates that you mentioned?

A. Yes, sir. I was there on these dates. I made a note of the time that I was there—when I went on it.

Q. Did you at that time find any notice posted on the northwest [fol. 234] quarter of Section 3 of a claim to that land by one Tincker, or by anyone else?

A. No, I did not.

Q. Did you on that trip find notices posted on any adjoining land?

A. I found a notice on the northeast corner of the northeast of Section 3, dated August 4, 1902, by J. W. Wade.

Q. Did you make a note of that in your book?

A. That is all I made, just what I saw. It is right here, right at the corner (indicating.)

Q. Do you know what quantity of timber there is on that 40, the southwest of the northwest of 3?

Mr. Whitcomb: We object to that as incompetent, immaterial and irrelevant.

The Court: No. I think it may be quite a circumstance in the case. It is this quarter that is in question. He may answer that.

Mr. Whitcomb: I wish to note an exception. I cannot see on what theory it is material, your Honor.

A. I will tell you exactly. I estimated that. My estimation was in 1905. It was at that time that I estimated that to be sure of that. Fir, 350,000; cedar 150,000; hemlock 400,000, and this, what they call larch or white fir, 25,000. That makes 925,000 feet all told together.

Q. When was the next trip that you made up there after the year 1902?

A. On this land it was in 1905.

Q. Does your diary show the time that you were up there in 1905?

A. Yes, sir. That is it right there (indicating). You will find [fol. 235] it right there (indicating).

Q. Well, will you refer to your diary and state what time you were there in the year 1905.

A. I got up to a place—I think the place at the end of the line at that time was called Warnick. I arrived there on the 5th.

The Court: The 5th of what?

The Witness: 5th of May, 1905, and I went into camp that night.

Q. And did you go up to this northwest quarter of 3?

A. I did, at that time. Now, I will tell you how long I was in there; the 5th, the 6th, the 7th, the 8th, the 9th and the 10th. I had my breakfast in the camp on the 10th. I was camped on Section

12, right at the creek there that I called at that time Coal Creek, but I don't think that that is its right name. I called it Coal Creek.

Q. That is, you made your headquarters on Section 12?

A. Yes, sir. On the northeast corner of Section 12.

Q. And from Section 12 you went out to Section 3?

A. Yes, sir. I worked out from there. There was a trail there.

The Court: You said before the 10th. Now, it was after the 10th that you were on this Section 3—after the 10th of the month?

The Witness: Oh, yes.

The Court: It was after the 10th.

Q. After the 10th of May, 1905?

A. Yes, sir—no, I went up there about the 5th.

The Court: You went up to Warnich about the 5th, did you not?

The Witness: Yes, sir, and I stayed around there the 5th and [fol. 236] 6th. I worked out of that one camp. I went right over to Section 12 and I looked over what they had measured there, the 5th, 6th, 7th, 8th, 9th and 10th.

Q. As I understand you, Mr. Hilligoss, between those dates you examined this land over on Section 3?

A. Yes, sir.

The Court: That is what I was getting at.

Q. Then what did you do after the 10th. Did you go out of the country?

A. I went out of there; yes, sir.

Q. What kind of an examination did you make of the southwest quarter of the northwest quarter of Section 3, Township 39, Range 6, and generally of the northwest quarter of that section on the occasion of this trip in May, 1905?

A. The northwest quarter?

Q. Yes, the northwest quarter, and also the southwest of that northwest.

A. Well, all I looked at was the southwest of the northwest quarter. That is all my notes called for me to examine, and I examined that at that time.

Q. That was the only part of the quarter that the railroad was claiming?

A. Yes, sir.

Q. That was the time that you made the estimate of the amount of timber on it?

A. Yes, sir. That is the time I estimated the timber.

Q. Have you been up there recently?

A. Yes, sir.

Q. Is there about the same amount of timber on it that there was when you were there in 1905?

A. Just about the same. I didn't see anything cut that amounted [fol. 237] to anything. There might have been a tree or two cut.

Q. When you were there in 1905 did you find any notices of any claim on this 40?

A. I didn't find any on that 40, no, sir.

Q. Was it still your practice, when you were up there in 1905, to take a record if you found any cabin or any improvements or any notice?

A. If I found anything, I would take the notices down—whenever I found them.

The Court: How is that? You would take them down?

A. Yes, sir. I generally copy the notices.

The Court: I see what you mean.

Q. You mean you copy them in your record?

A. Yes, sir.

Q. Will you read the record that you have of the inspection of this land in May, 1905.

A. "Southwest northwest; high, rolling hills. Site hilly, rolling and rough."

Q. Just a minute. Let me see if I can read it.

A. I cannot see very well from here.

Mr. Balmer: Any objection to my reading this?

Mr. Whitcomb: No; go ahead.

Q. I will ask you, Mr. Hilligoss, if this reads "Southwest northwest 3-39-6, high, rolling, site hilly, rocky cliffs, some small benches with good growth of small hemlock and cedar?"

A. Yes, sir.

Q. Is that it?

A. Yes, sir.

[fol. 238] Q. Now, does your book also contain the figures of the estimates of the timber that you made at that time?

A. Yes, sir.

Q. And those are the figures that you stated some time ago?

A. Yes, sir.

Q. Does your record also show a cabin which you found on Section 3 on the occasion of your trip there and which you entered in your record at that time?

A. Yes, sir.

Mr. Whitcomb: I object to that.

The Court: I think it is competent. You are claiming this as one continuous contract. He is now testifying with respect to a cabin about which you have been offering evidence.

Mr. Balmer: No, I think not. The purpose is this; his record shows that he found and noted a cabin on some land adjoining this, but it is not claimed by Reed or by his predecessors.

The Court: Another 40?

Mr. Balmer: Yes.

The Court: Well, it shows the conditions.

Mr. Balmer: It shows the conditions, and it indicates that he put down what he found there. If he put that down, he would put it down if he found one on this land in question.

The Court: Well, I do not know.
Mr. Balmer: At least, that is the purpose.

Q. Did you answer the question whether you found another cabin?
A. I found some cabins on the northeast quarter. That would be over in this corner (indicating). There was the same four logs [fol. 239] in one place and a notice, and now there was a little cabin up here on that 40 there (indicating).

The Court: Which 40 is that?
The Witness: The northeast right up on the hill—right on high ground.

Q. Did you find on that trip or on any trip in 1902 any cabins on the southwest quarter of the northwest quarter of 3, or anywhere on the northwest quarter of 3?
A. No, I didn't find any cabins on the northwest quarter of 3.

The Court: Did you find any evidences of preparation to build there?
The Witness: No, sir, I did not.
The Court: Find anything showing that human agencies had been at work?
The Witness: Well, I will tell you—there was an old trail that I think was of some trappers, that went up this little creek—a blind trail that went up the creek.
The Court: Did you follow where it went to?
The Witness: No, I did not. If you followed every one that you saw, you would never get out of the woods.

Q. Since 1905 have you been up there on other occasions, Mr. Hilligoss?
A. Yes, sir.
Q. How many times?
A. Oh, I will tell you. I have been there, pretty near every year since that except 19—well, I can tell you. There was two years I was in the Glacier National Park. I think it was in 1913-14 that I was not in there. Every year other than that I have been in [fol. 240] there. I can tell the various dates from these books.
Q. When was the first time you ever found anyone on the northwest quarter of section 3?
A. Now, I will have to look up my notes on that. On December 2d or 3d, 1914. I was looking over lands in section 3—in sections 2 and 3.

The Court: In what year?
The Witness: That was in 1914.
The Court: What dates in December?
The Witness: December 2d and 3d. That was the first time I ever saw anybody there, and I went up to Mr. Reed's house. There was a boy there and he told me that he was Mr. Reed's son, and a couple more or three boys more, and I think they were going out hunting. Snow was on the ground. Well, I asked him whose son he

was and he said that he was Mr. Reed's. I said, "Who has been cleaning this trail out," and he said "I have been cutting it out and fixing it up. You see, my folks are going to move up soon." So I went on up the creek and I left him there, and when I went up about—well, I should think over a quarter of a mile on to this 40—when I went across the creek, why, I saw two—no, I saw one wildcat on a log, and the sun was shining and he didn't see me. He had his head looking down and I got close to him and he jumped up. I went up a little further and then I went back to the house and the boys were there and I said, "Now, boys, I saw a wildcat," and they got right out and took the trail—there was snow on the ground and they took the trail, and I went over to section 4, and that was the first time there was a cabin there—on section 4—and that was [fol. 241] the first time that I ever found anybody—well, there was nobody there, but I saw smoke coming out of the house.

Q. What land are you talking about now?

A. Four. Then I came back to Mr. Reed's house, and the boys said that they went up and one of them got a shot at the wildcat but that they didn't get him. That was the first time I ever saw anybody at Reed's house.

Q. Previous to that had you seen Reed's house?

A. Yes. I had been there before that, a number of times.

Q. And on what 40 is Reed's house on.

A. Well, it is prety close—well, it is on the northwest of the northwest of lot 4, section 3.

Q. Have you ever found, on any of your trips up there, any one upon the southwest of the northwest of 3?

A. The southwest?

Q. Yes.

A. No, sir.

Q. When was the first time you ever found any notices indicating an adverse claim to the southwest of the northwest of 3?

A. Well, I think it was—well, now, I will tell you. It was quite a number of years after that I found some notices there that I copied, but I cannot tell you the dates of them unless I looked them up.

Q. On the occasion of your trip there in 1914, that you have just spoken of, did you make any memorandum of what you found?

A. 1914?

Q. Yes.

A. Yes, sir.

[fol. 242] Q. Will you read into the record what you found on that occasion.

A. This is a notice copied on the second day of December, 1914. Notice on the house—now, that is when I came back and the boys were there. "Date of settlement November 26, 1906. Charles W. Reed has a small cedar shake house about four acres slashed; small patches cleared around the house between stumps; some small fruit trees, about four years old; don't think ever has lived here any length of time; son stopping in house with three other men; hunt-

ing. Reed's son clearing out trail; says his father will move up soon."

Q. Was he clearing out the trail towards the river from his house?

A. It was below his house, down about half a mile. I seen where they had been cutting some logs that had fell across the road, and they had been cutting them down.

Q. That would be down towards the river?

A. Yes, sir.

Q. It was not on the section at all?

A. Oh, no, it was not on the section at all. It was north of the section.

Q. Was this occasion in 1914 the first time you found any notices posted on the homestead claim on the part of Reed?

A. No, I ain't positive of that. There might have been one down at the corner there. I think that was the first time that I could read any. I will tell you. There were some boards and boxes with notices that a squirrel or something had eaten off of and you could [fol. 243] not make them out. There might have been a notice there.

The Court: Where?

The Witness: At the section corner. That would be between sections 3 and 4. I remember that there were some little boxes and some boards, but I copied the first notice that I ever saw up there. I copied it just where I could read it. That was on Reed's door.

Q. That was not on the occasion of 1905 or 1902?

A. No, I didn't see any notices there then.

The Court: When did he see the other notices?

Q. Can you say when you first saw any notices up there at the corner?

The Court: Or what would indicate or seem to him to be notices.

Q. Yes. Now, you may look at your diary. When were you there after 1905?

A. I was there in 1907-8-09.

Q. Were you up there in 1906 at all?

A. I don't think I was.

Q. You were up there in 1907-1908-1909?

A. I might have been in that township, but I was not on this land. I was in 1907 up in this land right there (indicating) looking over.

Q. That is, you were not on this land in 1906?

A. I don't think I was.

Q. You were down there in 1905?

A. Yes, sir.

Q. You were next over in 1907?

A. Yes, sir.

Q. And you were over in 1908 and 1909?

A. Yes, sir.

[fol. 244] Mr. Whitcomb: What year was it that you found the notice that you could not read?

The Witness: Well, it would be—I will tell you—I don't know postively about that, but it was between 1905 and 1908, along there some place. I know that there was a notice. I know that there was a tree there and it was noticed. It had been noticed.

The Court: Between 1905 and 1908?

The Witness: Yes, sir.

Q. But that would not include the year 1906?

A. No.

Q. Because you were not up there?

A. Because I was not up there. There was a tree and I could not make it out.

Q. You didn't see at that time any notice that any one was claiming the southwest of the northwest of 3?

A. No, I didn't see any notice claiming that.

Q. Have you been up there since 1914?

A. Yes, sir.

Q. How many times?

A. Well, I was there in 1915, in 1916, 1918 and 1919, and I have been up there this year.

Q. You had better state what times of the year you were up there.

A. 1914?

Q. Yes.

A. 1915?

Q. Yes. From 1915 on up,—on up to the present time.

A. I was there—I was up there August 4th and 5th, 1915.

Q. All right. When were you up there in the years after that? [fol. 245] A. I was there June the 29th and 30th, and July 1st, 1916.

Q. All right. When were you there following that?

A. I was there February 12, 13, 14, 1918. Here is another notice I see that I copied.

Q. Now, was it on the occasion of this trip in 1918 that you copied a notice of Reed's claim?

A. What is that?

Q. Was it on the occasion of this trip in 1918 that you copied this notice?

A. Yes, sir; I copied this notice.

Q. Where did you find this notice in 1918?

A. This was at the section line, northwest of northwest of 3.

Q. Of 3?

A. Yes, sir.

Q. Was there prior to that time——

A. (Interrupting.) Hold on. Yes, that is right. That was at 3.

Q. That was at the northwest corner of 3?

A. Yes, sir.

The Court: What does that notice show there?

Q. Will you read that notice.

A. "Location notice, November 24, 1906. Know all men by these presents, the undersigned, a citizen of the United States of America, this 24th day of November, 1906, made settlement by purchase of all prior rights under and by virtue of the homestead laws made and provided in such cases, the following described lands, to-wit, being lot 4 and the southwest quarter of the northwest quarter, and the west [fol. 246] half of the southwest quarter of section 3, township 39, Range 6 in Whatcom County, State of Washington according to Government survey. Charles W. Reed. Witnesses: W. J. Tincker," —I think that is the name—"W. M. Smithy and E. M. Magner." Lots of times these names, when they are blotted, it is pretty hard to read them. I might not have it right.

The Court: That is probably Magner.
The Witness: You see, they get blotted there.
The Court: You found this notice in what year?
The Witness: This notice was in 1918, when I copied this.
The Court: You found it?
The Witness: Yes, sir.

Q. Was that the first readable notice that you found on the northwest——
A. (Interrupting.) Yes, sir. That is the first one I found on this land—on this corner.

The Court: What time in 1918?
The Witness: I was there on the 12th—well, I was in there on the 12th and the 13th and the 14th—I was in that country. Let me see, I have got that right here. I was there in February.
The Court: What date in February?
The Witness: The 13th.
The Court: The 13th of February?
The Witness: Yes, sir.
The Court: Yes.
The Witness: Well, I was in there the 12th. Let me see; maybe I dated the notice. I know that I was there those dates. "Copied 2/12/18.
The Court: February 12, 1918?
[fol. 247] The Witness: Yes, sir. I was there three days, and when I marked it on the book I was on these lands.
The Court: And that notice was of November what, 1906?
The Witness: November 24, 1906.

Q. Now, you testified, as I recollect, a short time ago, that you found a notice on the house in 1914?
A. Yes, sir.
Q. Are those two notices, that is, the one you found on the house in 1914 and the one you found on the northwest quarter of section 3 in 1918, the only notices that you could read that you ever found of any adverse claim to this land?
A. That is all, yes, sir. I might have seen some there since that. There is a notice there now, you know. There is the same notice, but I never copied it afterwards—it is the same notice.

Q. You have been up there since, 1918, haven't you?
A. Yes, sir.
Q. How many times?
A. I think twice.
Q. When were those occasions—about—it is not necessary to give the exact dates.
A. Well, I think I was there in October. I go to so many places. I have got to look at my books. I am on the go all the time. I have got to look at my books.
Q. You are speaking now of the two trips that you made up there when I was with you?
A. Yes, sir.
Q. Just for the sake of brevity, were those trips made, one last fall and one a few days ago?
[fol. 248] A. Yes, sir.
Q. Now, let me ask you whether on all the occasions when you have ever been up there you ever found any one on this land or in or about Reed's house except this one occasion when you found the boy on the trail?
A. That is the only time I ever saw anybody in the house, when I saw Mr. Reed's son. He told me he was his son. That was the only time I saw anybody up there at the house.
Q. Was there anybody up there the two times that you and I were there?
A. No, sir.

Mr. Balmer: I think that is all.

Cross-examination.

By Mr. Whitcomb:

Q. Mr. Hilligros, when you went up there on to this land, which way did you go?
A. The first time—do you want to know how I went on it the first time?
Q. Yes.
A. I started in—well, you have got a blueprint there. I can show you right on that exactly. Better let me tell you from that. I think you have got it there.
Q. Mr. Hilligoss, this just shows the one township.
A. That is all right. I will show you how I went from my camp. There is a camp right in here (indicating). There is my camp (indicating). I had located this here section line (indicating). That would be on the line between one and 12 (indicating). There is a corner right in the river. There is where I made my camp. [fol. 249] This railroad (indicating) was not there then. Then I located that corner (indicating).

Mr. Balmer: Which corner?
The Witness: That would be the quarter stake between one and two. Down in there (indicating).

Mr. Balmer: Yes.

The Witness: And I think that was all done that day. Then I came back here (indicating) and I took this corner (indicating) and I went up through here and run this line out (indicating).

Q. Between sections 2 and 11?

A. Between sections 2 and 11, and then I went to that corner (indicating).

Mr. Balmer: What corner are you speaking of now?

The Witness: That is the quarter stake of two and three. And I went up here, and went up to that corner (indicating).

Mr. Balmer: Which corner is that?

The Witness: That would be the northeast of the northeast of section 3, and I found a notice there. Now, when I crossed to go over to this land (indicating)—this quarter stake between 2 and 3—this is awfully high ground—very high—I stepped it and here was some land I wanted to look at, in here—them two 40's (indicating).

Mr. Balmer: Which two 40's?

The Witness: You see, this one here and this in here (indicating); them two 40's in there (indicating).

Mr. Balmer: Well, you describe them.

The Witness: Well, I wanted to look at the southwest of the northwest and the north half of the northeast and the north half of the [fol. 250] southeast of section 4. That is what I was to examine, and then I struck this section from here (indicating) and went clear across it but I didn't find that corner but I found an old trail going up the creek.

Q. Where was this trail?

A. It is on this side of the creek. I didn't follow it clear down. But I crossed a little trail. I looked quite a little there. I thought maybe there was a section line, and I knew that it was not far from where I made my paces.

Q. This trail, that was on the southwest of the northwest?

A. Yes, sir. I went out to the section line and I found this old trail. It was a very blind trail.

The Court: Now, what year was that?

The Witness: That was in 1902, the first year I went in there and I didn't find that line. Then I went south. After crossing on the creek a little west I went south to get on this 40 that we were selecting. That 40 I had to examine.

Q. That was the Magner property?

A. That was the Magner property, and then I went right down through and when I went down—stepped down here (indicating) I found another trail—an old trail coming in here (indicating). That was about night. I said, "I will just take that trail and come back another time." I saw the timber was good enough to take. I had come through this 40, and I went up on this one (indicating) and when we got along here (indicating) there was a trail coming in.

[fol. 251] Q. That is a trail across in the other township?

A. Yes, sir.
Q. Across the 40?
A. Across the 40 that comes in there (indicating).

The Court: Across what?
The Witness: Across this (indicating).
Mr. Whitcomb: Across the township line?
The Witness: Yes, sir.

Q. That is a trail, Mr. Hilligoss, coming from the river?
A. Yes, that came from the river. It was an old trail. I didn't have time to look that night. I went right on down, and I went down afterwards and found that trail, and I always come around that point (indicating). I have never crossed up over that hill since then because it is a high hill, and there is a trail on the river and a man can go down that way.
Q. You didn't find that section line there that time, when you were there at that time?
A. I didn't find that section line there that time; no, sir.
Q. Or the corners?
A. No. That was in 1902. But I knew that I was pretty close at the time. That is what I was looking at—just to see the timber.

The Court: That was in 1902?
The Witness: Yes, sir.
The Court: Do you remember the date that you were there?
The Witness: When I was there?
The Court: Yes; in 1902. When you found this blind trail?
The Witness: I think it was in August that I was there, in 1902. Yes, sir. I came out from Maple Falls and camped out August 12th, [fol. 252] 13th, 14th and 15th. On that day I had breakfast in camp—had breakfast and dinner and then got into Maple Falls; that is, so as to get out the next day. Those were the times.

Q. That is all the memorandum that you have that you made at that time while you were up there, is it?
A. Well, I have a book, you know, that I had with me, yes.
Q. A book that you had with you?
A. Yes, sir. Now, you see, here was this notice when I found this corner (indicating). A man had a little notice right up there. Ward, I think his name is.

Mr. Balmer: That was not on this land?
The Witness: No. It was on the same section. But I didn't find any that time.

Q. When was it that you went up there again, Mr. Hilligoss? You didn't go up again until what time?
A. 1905, I think it was said, wasn't it? I know that it was a number of years that I was not there.

The Court: You were there in 1905?
The Witness: Yes, sir.

Q. Which way did you go up that time?
A. I want around by that trail.
Q. You followed the trail?
A. I followed the trail to an old cabin that was quite close—it was an old—a little, old log cabin made of poles and I think it would be on lot 1 of section 4. That is what Mr. Manger had made of logs. There was a little place made of logs. That is where I picked up the section line. There was two or three lines blazed there. I knew that there was some blaze there, and this trail kind of went into that place. [fol. 253] I remember of finding that there—the log cabin.
Q. At the time you found Mr. Reed's son up there what way did you go on to the southwest of the northwest—what route did you take?
A. When I went up on to the southwest of the northwest?
Q. Yes.
A. Why, I took right up the trail.
Q. There was a trail right clear on to it?
A. Yes, sir. I went right up the trail.
Q. I don't remember whether you said what year you first found Mr. Reed's place up there—his cabin.
A. Well, it would be between—between 1905, when I was there, and 1908, I think it was—about that time my impression is.

The Court: And you were not there in 1906?
The Witness: Yes, sir. Well, I will tell you, it was after 1905.
The Court: With 1906 excluded, because you said a while ago—let me see now, so that there will not be any mistake—"Between 1905 and 1908 I first found the notices, that I can remember."
The Witness: Yes, sir.
The Court: "Not there in 1906." That is what you testified.
The Witness: Yes, sir.
The Court: Is that correct?
The Witness: Yes, sir.
The Court: Between those dates, with 1906 excluded?
The Witness: Yes, sir.

Q. Were you on this land in 1907?
[fol. 254] A. I will have to look, to see my dates. I cannot keep them in my mind. I was not on this particular land in 1907. I was not on that claim at that time. I was in that township, but I was not on that piece of land.
Q. Were you on there in 1908?
A. Yes, I was there. I camped out at that time. I was in there quite a while. I was on sections 6, 3 and 4. Yes, I was there. I was on sections 3 and 4 both, at that time.

Mr. Balmer: That was in 1908?
The Witness: Yes, sir.

Q. Do you remember what you saw in there at that time?
A. Well, I was looking to see whether they were cutting any timbers or whether there were any fires burning on any land—to see

whether there was any fires or whether they were cutting any timber. If they started to cut timber in some places, why, I would have to look after that.

Q. Did you make any particular examination of this?

A. Generally, after I found this trail I generally went up this trail because that was the easiest way for a man to go—to follow this trail.

Q. Did you go to the boundaries of that land at that time?

A. No, I didn't go to the boundaries of that land at that time. I would go on the trail, and I saw there was no logging or skid roads and there was a gulch there and they could not get out any other way, and that is all I would go.

Q. Were you on there in 1909?

A. Yes, sir.

The Court: This trail that you went up led up to this cabin, did it?

[fol. 255] The Witness: It goes right close to the cabin.

The Court: Did you see the cabin in 1908?

The Witness: Yes, sir. It goes right up to the cabin.

The Court: Did you see anything planted around?

The Witness: Well, they had a little garden stuff—they had a little cleared around the house there. The first time I found the cabin in there there must have been, I should think, about four acres that I saw there.

The Court: Slashed?

The Witness: Yes, sir.

The Court: But there were small patches cleared, you say?

The Witness: Yes, sir.

The Court: Now, in 1908 was any of that being cultivated or looked after?

The Witness: No.

The Court: There was no garden or anything?

The Witness: I didn't notice any garden. In 1908 there might have been a little garden, but no big clearing—not any more than what you can see there is today—oh, there may be a little more now.

Mr. Balmer: This cabin is all on the 40—on the northwest of the northwest?

The Witness: Yes, sir.

The Court: Now, when you were there in 1905 did you see any evidences of cultivation?

The Witness: No, sir, I did not.

The Court: The time that you were in there then was in the winter time?

The Witness: Yes, sir. I didn't see any evidences then.

[fol. 256] The Court: Well, there was snow then there?

The Witness: Yes, sir.

The Court: You could not see whether there were any potatoes dug, or anything of that kind?

The Witness: No, I could not see anything of that kind.

Q. Were you on this particular land in 1909, Mr. Hilligoss?

A. Well, I have not got anything to show. I was at Glacier, and it is there, in 1909. I generally got off the train and went right up to see who was on that land. That is all I was there to see—those were my instructions, to go in and examine these lands.

Q. You cannot swear positively that you were on this land in 1909?

A. No, I would not say whether I was right on that land at that time when I was there.

Q. Were you there in 1910?

A. No, I don't think so.

Q. You don't think you were there in 1910. Then what was the next year that you went in there?

A. Well, in 1909 I was upon that piece of land, and I was there in 1914. That is when I saw his son.

The Court: On the same land in 1909?

The Witness: Yes, sir.

The Court: Do you remember the date?

The Witness: I was there in July. I will have to look in the book to tell the dates.

Mr. Balmer: That is what you read from once before, isn't it?

The Court: I thought so.

The Witness: Yes, I was up there at that time.

Mr. Balmer: Now, is there a memorandum there that you were [fol. 257] on this land?

The Witness: Yes, sir. I have got a book some place. I have always got a field book with me. I suppose I have got hundreds of them books but I could not carry them up here and so I have made a memorandum of them. This says: "July '09, no one living on the west half of the northwest quarter of section 12,"—that is 12—"and the northwest quarter of the southwest quarter and the southwest quarter of the northwest quarter of section 2, and the southwest quarter of the northwest quarter of section 3."

Q. Go on.

A. "And east half of the northeast quarter of the northeast quarter of the southeast quarter of section 4, township 39, range 6."

Q. That last description is Mr. Magner's?

A. Yes, sir. And there was no one living on that place at that time. No one living there.

The Court: Now, just what do you mean by "no one living." No one actually there?

The Witness: No one was there; yes.

The Court: Did you include in that evidences, or lack of evidences of any one coming or going between intervals—between dates?

The Witness: Now, I will tell you. We will take Mr. Reed's place. His house and things looked like somebody had gone and stayed there a while, but did not live there permanently. I will say this, that you could see that by the paths and stable. Now, his stable that he has got there, I don't think a horse ever stayed in there a

month from the indications around where the door was, and you [fol. 258] can take it where he goes to his water, the path is all grown up with grass. Now, they have got little patches amongst the trees. I will admit that they have got a little bit of stuff in there, but it is just a little patch here and a little patch over there, and that is the way it is there.

Mr. Balmer: How about the path to the privy?

The Witness: Well they had mowed the grass down there just a few days ago.

Mr. Balmer: Has there been tall grass growing in the path?

The Witness: Yes, sir, and down by the well. Somebody had been there inside of a week, for the grass was green that they had cut down and mowed down, and they had been hoeing some potatoes there. I could see that. There has been somebody there, but to live there permanently I do not think that there has been anybody living there permanently. In the winter time, when I was there, I saw the boy, and that was the first time I ever saw anybody there, and the only time I ever saw anybody there.

The Court: When you found such things as that would you make a report of it to your superiors?

The Witness: Yes, sir. I always make a report of what I find. I always make a report, every place I go, of what I find and see.

The Court: When you visited up there did you look at Mr. Reed's house?

The Witness: I was in the house the time that the boy was there. That was the first time I was in the house.

Q. Did you look in it at any other time?

A. Well, I never went into the house except when the boy was [fol. 259] there.

Q. When you went into it, did it look like a habitable place?

A. When I went in with the boy I suppose they had beds and stuff and cooking utensils, and he has a woodshed, you could see that, where he cut some wood, and he has a little house—that is, a kind of root house at the side there, but he has got no chicken house. There has never been a chicken, I don't think on the place. I never saw a chicken house there.

The Court: A chicken would not last very long up there among those wild cats, would it?

The Witness: No, I don't think so.

Q. This land is all about the same up in that vicinity, isn't it?

A. Yes, it is. It is a pretty rough country. It is hilly and rough. It is all about the same.

The Court: How is the soil? I do not recall that anybody has been telling me about the character of the soil, except by inference. What kind of soil is it? A red loam?

The Witness: No. I will tell you. It is a kind of a stony soil up in that country, the most of it.

The Court: A float, you mean?

The Witness: Yes, sir.
The Court: It is a red, sandy soil?
The Witness: It is not very red in there.
The Court: Is it clay mixed with the float?
The Witness: Yes, sir, kind of clay mixed.
The Court: And it produces tall grass, does it?
The Witness: Yes, sir.
The Court: That you have to mow down?
[fol. 260] The Witness: It produces grass, and those gulches up there, they will produce grass. As a rule grass will grow good up there. Grass will grow where timber won't.

Q. This southwest quarter of the northwest quarter is practically the same kind of land as Mr. Magner's, which adjoins it, isn't it?
A. No. Mr. Magner's, I think part of it is better land than that. It is lower.

The Court: His land is lower?
The Witness: Yes, sir; his land is lower. You take the west part of his land, it is quite a little lower than Mr. Reed's.

Mr. Whitcomb: That is all.

Redirect examination.

By Mr. Balmer:

Q. What would you estimate the total yardage of the ground now in cultivation to be—about how much land would you say is planted?

The Court: You mean the part that is actually planted there?
Mr. Balmer: Yes.

A. Well, it would be less than a quarter of an acre.
Q. And does that lie in one patch?
A. No, sir, that does not lie in one patch. I think it is in some four or five different patches.
Q. Are there stumps and uncultivated pieces between?
A. Oh, yes. Big stumps in there.
Q. What is planted in there now?
A. I saw some onions and potatoes.
Q. How many onions?
[fol. 261] A. There is a little bed, maybe six feet wide and maybe ten or fifteen feet long. I didn't measure it, and they must have planted last fall, because they are up pretty well. I know that he has some onions there and he has got some bushes.
Q. What kind of bushes?
A. Well, berry bushes of different kinds.
Q. Some of them grow on the stumps?
A. They are growing right around the stumps.
Q. And you spoke of potatoes. How much ground is in potatoes?
A. Now, I know one place—I saw one place a little bigger than this room with potatoes in. I think they have been hoed, I would say. It is a small place.

Q. Would you say that it was 25 by 25?
A. Well, it might be a little longer than that.
Q. And some strawberries?
A. Sir?
Q. And some strawberries?
A. Oh, there are some strawberry bushes there.

The Court: And raspberries?
The Witness: Yes. I think there are some raspberries. I think there are some blackcaps that grow over the stumps. I will tell you, I was there at one time——
The Court: You mean the vines?
The Witness: These big blackcaps.
The Court: Those are the Oregon Evergreens.
Mr. Balmer: Yes.
The Court: They do not vine much. They run up on stumps and they die the second year. That is, they grow up one year and [fol. 262] the next year they bear and die.
Mr. Balmer: That is the raspberry you are speaking of now?
The Witness: That is the raspberry. I think that he has them there. I am sure that he has.
The Court: That is what you are talking about, is it?
The Witness: Yes, sir.
The Court: They do not vine around much. They stick up pretty high, do they not?
The Witness: Well, they will generally run over a stump. They don't stand up very well. They hang over very well.
The Court: They stand up very straight, I understand.
Mr. Balmer: They will bend over at the top, won't they?
The Witness: Yes, sir. They grow just like our red raspberries.
The Court: You have said something about slashing?
The Witness: Yes, sir.
The Court: You said that there were about four acres slashed, exclusive of this little patch.
The Witness: Yes, sir.
The Court: Now, what is the extent of the improvement that has been done on those four acres? How far has that been carried out? Has it been carried out to the extent of burning, slashing and seeding?
The Witness: I think they just slashed that. I think it was all cut down at one time—that four acres—and then they cleared up as they got up to it—these little patches. Most of it is close to the house and off kind of south and east of the house.
The Court: Has the brush been disposed of from this slashing?
The Witness: *On*, no.
[fol. 263] The Court: Has there been any grass sowed around there?
The Witness: Only in one little place. Down at the northeast there is a little grass sowed in there—where it is kind of rolling like. It is set out in grass there.
The Court: What is it, timothy or clover?

The Witness: Clover.
The Court: Red clover?
The Witness: Yes, sir.
The Court: Does that grow good up there?
The Witness: Well, it seems to be growing.
Mr. Balmer: How about the fruit trees. Are they planted in an orchard, or are they scattered around?
The Witness: They are scattered around. Trees are scattered all around here and there. They are pretty scrubby.
Mr. Balmer: Are they in this part nearest the house?
The Witness: Yes, sir. They are close to the house.

Mr. Balmer: That is all.
Mr. Whitcomb: That is all.

(Witness excused.)

Mr. Balmer: I had a statement prepared showing the several amounts of taxes that have been paid for the various parts. Now, we can segregate it for the years from 1912 to 1919 to show the exact amount paid on this 40. For the first three years we could not segregate it exactly, but we could divide it by area from other lands, and therefore for those three years can only state the figures approximately, and for the remainder I can state them exactly. With that understanding I intend to read in evidence a statement [fol. 264] covering the amounts of taxes that have been paid by the railroad company on the southwest quarter of the northwest quarter of 3, township 39, 6.
The Court: All right.
Mr. Balmer: 1909, $20.65. I am inclined to think that that is possibly a little exaggerated, because I could only estimate that by area. 1910, $15.25; 1911, $17.75. Those figures are approximate. From then on the figures are exact. 1912, 38.16; 1913, $45.95; 1914, $42.81; 1915, $30.78; 1916, $38.85; 1917, $45.11; 1918, $20.84; 1919, $24.43.
I will recall Mr. Peavey.

G. B. Peavey, a witness on behalf of the defendants, recalled.

Direct examination.

By Mr. Balmer:

Q. Mr. Peavey, for the last 20 years you have been continuously in the business of cruising and appraising timber lands?
A. Yes, sir.
Q. Have you been locating lands during that time?
A. Yes, sir.
Q. (Continuing:) On your own account as well as for others?
A. Yes, sir.

Q. Are you familiar with what timber land is now available for selection—at the present time?

A. Well, in certain localities.

Q. In what localities?

A. Well, Whatcom, Skagit and Snohomish Counties.

[fol. 265] Q. Whatcom and what other?

A. Whatcom, Skagit and Snohomish Counties.

Q. Clallam?

A. Not much in Clallam.

Q. Have you made any efforts yourself of recent years to locate strip on Government timber lands?

A. Yes, sir.

Q. On your own account?

A. Yes, sir.

Q. Can you state whether there is left available for selection under railroad scrip any 40-acre subdivisions of public lands on which there is as much timber as 925,000 feet of fir, cedar, hemlock and larch.

Mr. Whitcomb: Objected to as irrelevant and immaterial.

The Court: What is the object of that?

Mr. Balmer: That is material on the plea of laches.

The Court: Let him answer.

Mr. Whitcomb: Exception.

Mr. Balmer: You may answer.

A. I don't know of anything.

Q. Would you probably know of anything, if it existed, of that sort?

A. Well, there might be one scattering 40. I don't know of any. I had to locate some for myself, and I got a very poor 40, and I done the best I could to get a good one.

Q. What, in your judgment, is the greatest amount of timber that would be found on any 40-acre tract now open for such selection?

Mr. Whitcomb: Objected to on the same ground—for the reason that I made to the former question, and for the further reason [fol. 266] that it is not shown that he knows all the land that might be selected, and furthermore under the act under which they make selections they are not confined to these counties.

The Court: A man would be entitled to state that, for what it may be worth. There is quite an area in Washington that the Court would have to take knowledge of, outside of these three counties that he has testified about. The big timber belt would be on the peninsula, or down in the southwest part of the state.

Q. How about the land on the Olympia Peninsula? Is that open for selection, or is that in a Government Forest Reserve?

A. Most of Clallam County has been picked up by timber companies. The lands there have been gathered in.

Q. How about the remaining public land in that part of the state?

A. There is very little outside of the forest reserve.

Q. Now, will you answer the question that I asked a few moments ago as to the quantity of timber which in your judgment would be likely to be found on any 40 of the public lands that are now available for selection?

Mr. Whitcomb: We object to that for the reasons heretofore stated, and for the further reason that the witness has not shown any competency to answer. He has not shown that he has cruised all the public lands in these counties.

Mr. Balmer: This would be an interminable case if we made an effort to prove that.

The Court: He has testified before and he has been in this business a long time—in this particular part of the world, as I remember. He has been in this timber business for fifty years.

[fol. 267] The Witness: Yes, sir.

The Court: According to his testimony.

The Witness: Yes, sir; more than that.

Mr. Whitcomb: That does not show that he cruised all the public lands in the state of Washington, or in all these counties.

The Court: He does not have to, but if he has a pretty general knowledge of it, why, then he could testify. He can be asked as to what extent he knows about those things in this part of the country, and he certainly is entitled under his qualifications to testify.

Mr. Whitcomb: Exception please.

A. I should think that if any one could find a 40 with five hundred thousand feet on it, it would be a good find.

Mr. Balmer: That is all.

Mr. Whitcomb: No cross-examination.

(Witness excused.)

DAVID RUSSELL, a witness called on behalf of the defendants, recalled.

Direct examination.

By Mr. Balmer:

Q. You testified yesterday, Mr. Russell?

A. Yes, sir.

Q. For how many years have you been engaged in cruising timber in the state of Washington?

A. About 25 years.

[fol. 268] Q. And over what part of the state does your experience extend?

A. Well, Whatcom County, Skagit, Snohomish, some in Thurston,—Tacoma is in Thurston County, isn't it?

The Court: No. Tacoma is in Pierce County.

A. Pierce County, and I have been over in Jefferson County some.

Q. Have you been engaged in cruising land during that time as the agent for other parties or on your own account, or both?

A. Well, mostly as agent for other parties.

Q. Are you familiar in a general way with the amount of public land that is now available for selection—that is, the amount of timber lands in the counties that you have mentioned?

A. Yes, where I have been. Where I have been I am quite familiar, I think.

Q. Can you state from your experience whether there is now open and available for selection public land of the United States on which there is as much timber as 925,000 feet of fir, cedar, hemlock and larch—on a 40?

Mr. Whitcomb: We object to that as incompetent, irrelevant and immaterial.

The Court: Let him answer.

Mr. Whitcomb: And further because the witness has shown no qualifications. This act, may it please the Court, under which they are permitted to make selections includes the entire United States, and to show by the testimony of this witness, who is acquainted with only part of this country, that they cannot get any other land [fol. 269] in lieu of this anywhere in the United States, is almost ridiculous.

Mr. Balmer: You are wrong on that. Any state in which the railroad runs is the limitation.

The Court: That would be about from Minnesota to the Pacific Coast, would it not?

Mr. Balmer: Yes, sir.

The Court: And inclusive of Minnesota?

Mr. Balmer: Yes, sir.

The Court: I think he may testify. There is quite a little of this country that the witness has been in.

Mr. Whitcomb: Exception.

A. Why, I don't know of a 40 that is vacant, to place scrip on with that amount of timber, or even four or five hundred thousand. I have had parties write me and call me up on the phone to ask me if I knew of any. They have asked if I had a 40, or a fraction, on which I could place scrip containing that amount, and I have had to tell them that I didn't know of any.

Mr. Balmer: That is all.

Mr. Whitcomb: No cross-examination.

(Witness excused.)

Mr. Balmer: We rest.

Defendants rest.

Mr. Whitcomb: I have some rebuttal that I desire to put in, and I also desire to make a statement for the record.

The Court: All right.

[fol. 270] REBUTTAL

Mr. Whitcomb: I wish to get into the record in this case the dates when this land was withdrawn and when restored to entry. I attempted to get that information this morning from the Forestry Service, and I found that they did not have it, and so I have wired to the Land Office for the dates. I have been expecting, and am expecting an answer to that telegram. I thought if we had the dates we might get it in, but, at any rate, I wish to supply that by proper proof. If we can get the dates from the Land Office and agree that these are the dates——

The Court: Perhaps counsel on the other side has them.

Mr. Balmer: No, I have not get them. I don't know anything about them, in fact.

Mr. Whitcomb: The records that we have here on that show the dates that it was restored and there is data here showing the time when it was open to entry.

The Court: Perhaps you can stipulate as to that.

Mr. Whitcomb: Yes, but that—the records that we have do not show the time when it was withdrawn and classified as mineral land. I would like to supply that, and if the information that comes from the Land Office can be used in that way I will do it that way. Othewise I suppose I will have to get it from Washington, if we find, in fact, that it was withdrawn, and that is my information.

Mr. Balmer: I do not know that it was ever so withdrawn. Of course, I will not resist any effort of counsel to produce the facts. There may be some delay, however, in getting them.

Mr. Whitcomb: I would like to supply that in the record when [fol. 271] I get that.

The Court: Any objection to that?

Mr. Balmer: I will not object to any postponement that may be necessary in order to give counsel an opportunity to present the evidence. Without knowing what dates and without having some opportunity to examine the records myself, I would not make any stipulation at this time consenting to their introduction.

Mr. Whitcomb: Can we not agree that if I get that information from the Land Office, that you can check it at the Land Office to see if it is correct?

Mr. Balmer: Yes.

Mr. Whitcomb: And then put it in without getting formal certified proofs?

Mr. Balmer: Yes. That is absolutely O. K.

Mr. Whitcomb: I will recall Mr. Tincker.

W. J. TINCKER, a witness on behalf of the plaintiffs, recalled on rebuttal.

Direct examination.

By Mr. Whitcomb:

Q. Mr. Tincker, did you ever see any notices of selection of the St. Paul, Minneapolis and Manitoba Railway Company on any of the corners, or anywhere upon the southwest quarter of the northwest quarter, or on the northwest quarter of Section 3, Township 39, Range 6?

A. No, sir.

Mr. Balmer: I object to that as incompetent, irrelevant and immaterial, and there is absolutely nothing requiring any notice to be [fol. 272] posted by the railroad company. It makes its selection by merely filing a list in the Land Office.

Mr. Whitcomb: It has been testified by Mr. Thompson here, a witness on behalf of the railroad company, that he and Mr. Russell posted such notices upon this land.

The Witness: No, sir.

Mr. Balmer: Well, you cannot impeach him on an immaterial issue.

The Court: I do not know whether it is immaterial or not. That was testified to here in the case, was it not?

Mr. Balmer: Yes.

The Court: I think it may go into the record. I do not know whether it is immaterial for this hearing or not.

Q. Did you ever seen any such notice?

A. No, sir; never.

Q. If there had been such a notice posted, or placed upon the trees there, do you think that you would have seen it?

A. Yes, sir.

Mr. Balmer: Objected to as calling for the witness's conclusion and not a proper question.

The Court: I think it would be all right in connection with the other evidence as to what he did there.

Mr. Whitcomb: In connection with the testimony that he gave yesterday about marking the boundaries.

The Court: Yes. I think that may stand.

Q. Mr. Tincker, what is the nature of this—you are acquainted with the nature of this land that Mr. Reed claims as a homestead, including the four 40s, are you?

A. Pretty much. The last two 40s complained of I didn't follow very much. They were not in my claim then.

[fol. 273] Q. Is this land suitable for agricultural purposes?

Mr. Balmer: Objected to as not proper rebuttal. It was part of the plaintiff's case in chief to show that this is land that would be proper to select.

The Court: Yes, that is true. However, I provoked the thing because you people had been talking about the land without going into that matter except inferentially. I provoked that a while ago, I guess. But this is a matter of the reception of evidence, which is in the discretion of the court, and I will let it go in.

Mr. Balmer: That is true.

The Court: And then if you want to have any say about it, I will give you a chance.

The Witness: What was the question?

The Court: Read the question.

(Question read as follows: Is this land suitable for agricultural purposes?)

A. Not all of it, but pretty much of it. It will always raise grass or hay, if it is cleared.

Mr. Whitcomb: That is all.

Cross-examination.

By Mr. Balmer:

Q. When were you last on the land, Mr. Tincker?

A. Oh, it has been a good while since I have been on the land, because I never bothered much about going there. I have not been there for a long time.

Q. How many years since you have been there?

A. I cannot say positively. It has been a long time.

Q. Had Read started his improvements when you were there?

[fol. 274] Oh, yes, he had his improvements there.

Q. You have heard the testimony in this case that in the length of time Mr. Reed has been there he has about an acre in cultivation.

A. He had about that when I was there. But that was quite a while ago. I don't know how much more he has.

Q. If the land is suitable for agricultural purposes, as you say it is, what is the explanation for not more than an acre being cultivated?

A. That has nothing to do with it. I have a ranch too, and I have only got a few acres cleared on it. A man is not supposed to clear the whole 160 acres. The law says that a man shall do improvements enough to show good faith. You understand that.

Q. Yes.

A. Yes, sir; to show good faith, and he can clear his land where he finds that he can raise things in the best places, the same as Magner has done, and on the side hills he can raise pasture for sheep, cows or anything that he wants to put on there.

Q. It will raise all those things?

A. Yes, sir; it will raise anything.

Q. Why is it that in the 12 years no more of it has been put into cultivation?

A. Because the man has to work for a living, just the same as I have to, and he cannot do all the work on the ranch and at the same time make a living, and, in addition, he has to buy a lawsuit.

Q. Did you examine all the blazed trees up on that land when you were there?

[fol. 275] A. When I was there?

Q. Yes.

A. I put all the blazes on the trees when I was there—when I owned the land.

Q. How about the surveyed blaze along the lines?

A. Well, the section line is always blazed?

Q. The section line is always blazed?

A. Yes, sir.

Q. You didn't examine all the blazes along the section line when you were up there, did you?

A. Not when Mr. Reed owned it, but when I had it.

Q. You looked at every blaze?

A. Yes, sir; I looked at them.

Q. Did you look at every blaze that was on the trees?

A. Not when I was there when Mr. Reed was owning the place. I never looked at the notices then because he was supposed to have possession of it, but I looked at the improvements and his cabin.

Q. How about the time when you were claiming it?

A. When I was claiming it I renewed my notices.

Q. When you were claiming it you renewed your notices?

A. Yes, sir.

Q. You didn't look at every blazed tree on the 40?

A. Yes, that belong to me—I looked at all my corners.

Q. How about the blazed trees on the line of the other corners?

A. How about the blazed trees on the line of the other corners?

Q. Yes.

A. There is only one place, on the township line and the section [fol. 276] line that would be blazed, and what I blazed myself.

Q. There would be a blaze along the township line and a blaze along the section line between three and four, would there not?

A. Yes, sir.

Q. Made by the surveyor?

A. Yes, sir.

Q. You didn't look at all those blazes, did you?

A. I didn't have to look at all those blazes. I went by my tree.

Mr. Balmer: That is all.

(Witness excused.)

W. M. SMITHY, a witness called on behalf of the plaintiffs, recalled on rebuttal.

Direct examination.

By Mr. Whitcomb:

Mr. Smithy, you have testified that you have been upon the boundaries of the northwest quarter of section 3, township 39 north, range 6 east, a good many times?

A. Yes, sir.
Q. About the year 1906?
A. Yes, sir.
Q. Did you ever see posted anywhere upon the northwest quarter of the said section 3 any notice of location or other notice of claim to any part of this land by the St. Paul, Minneapolis and Manitoba Railroad Company?
[fol. 277] A. No, sir.

Mr. Balmer: Objected to as incompetent, irrelevant and immaterial.
The Court: I think it is material—it looks to me like it is, as affecting this other evidence. I will let it go into the record.
Mr. Balmer: Exception.
The Court: It may not be material in the case under the issues, but it is a matter that has been testified to in the case.
Mr. Balmer: In view of the situation I did not ask Mr. Russell the question, and he did not testify about putting those notices up himself. The man who mentioned that was the compass man that was with him. In view of the fact that testimony on that point has been introduced in rebuttal, before the matter goes further, I would like an opportunity to re-open my case and call Mr. Russell on the stand on that particular point.
The Court: I will give you permission to recall Russell, and you can have him on sur-rebuttal, if you want to.
Mr. Balmer: All right.

Q. Are you acquainted with the character of the land included within the homestead claim of Mr. Reed?
A. Yes, sir.
Q. What is the character of this land?

Mr. Balmer: That is objected to on the ground that no proper foundation has been shown. The witness has not been shown qualified to testify on that
The Court: You mean whether it is good land, or bad land, or agricultural land, or scab land? He testified before, you know, how he had been up there and how he had been up in this country, and [fol. 278] things of that kind, and I think that any man who has been in this country for some time absorbs some general knowledge about lands—that is as to lands generally. He may answer.
Mr. Balmer: Exception.

A. Well, I have milked a few cows, and hoed a few spuds and harvested a few bushels of wheat.

The Court: He may answer the question. You can cross examine him to see how far his knowledge extends.
Mr. Whitcomb: Answer the question.
The Witness: What is the question?

(Question read as follows: What is the character of this land?)

A. Well, the land is rolling. Part of it is good soil and part of it is stony and part of it is heavily timbered.

Q. Is the land suitable for agriculture?

A. Yes, sir. That is, the biggest part of the whole entire claim. I have seen worse land than that cultivated.

Q. Is the character of this land similar to the character of the land adjoining it?

Mr. Balmer: Objected to as not a proper question. You have no evidence of the land adjoining it. It is a collateral issue.

The Court: I do not know that it would be of any assistance to the court.

Mr. Whitcomb: I do not believe that the question of the character of this land is material in this case at all, for the reason there has been no claim made in the pleadings in the case that this land was not open for homestead entry. The records show that it was open [fol. 279] for homestead entry and Mr. Reed made a homestead entry. It is not pleaded that it is such land that it is not open for such entry. In fact, I think the complaint shows, and I do not believe that it is denied, that it was open——

The Court (interrupting): I do not apprehend that it is made an issue here, but the court asked me some questions about it.

Mr. Whitcomb: I do not care anything about going into that, if that question is not before the Court.

The Court: But the probability or improbability of certain things have come up, which might be affected by the character of this land—whether it would be sought for agriculture or whether it would be sought for timber, or this, that, or the other thing.

Mr. Whitcomb: The reason that prompted the last question that was asked the witness is the fact that we have shown by witnesses here present that the Government has patented to homesteaders the land right around this, and, furthermore, that Mr. Balmer has accepted Mr. Reed's proof as to the rest of the land.

The Court: Well, I think I will let it in on that theory. There has been quite a little testimony about Magner's land.

Mr. Balmer: The Government has patented a great deal of the land in ex parte proceedings without any examination of the land and without any of the Land Office Field Agents knowing what kind of land it was.

The Court: Yes, that is true.

Mr. Balmer: Well, that takes us into a trial of the propriety of the patent issued to every other piece of land, immediately you compare this land to other land.

[fol. 280] The Court: That went in on this theory—the presumption is that the Government has passed on this, and it will be worth something, is it not?

Mr. Balmer: I do not think so.

The Court: It is just as you said yesterday with respect to these land offices down here that you were talking about in the land office at Seattle.

Mr. Balmer: Of course, every case is determined by the evidence

that is brought before them on that case. Now, what are the consequences? Suppose your Honor permits a comparison to be made of this land with the Magner land. Would not it logically follow that then we would have an opportunity in sur-rebuttal to bring in witnesses to prove, for instance, that witnesses in the Magner case may have testified falsely about the character of the land?

The Court: We are concerned here with the question of how the Government classified it.

Mr. Balmer: The Government does not classify land as agricultural land.

The Court: One of the conditions is whether it is agricultural before it can be opened for homesteaders.

Mr. Balmer: Yes, and that is generally by witnesses that testify at the hearing. The Government does not classify any land as agriculture, or otherwise.

The Court: Well, I do not claim to be a land lawyer.

Mr. Whitcomb: May it please the Court, I think we have all got clear off the track in going into this, for the reason that we allege in our complaint, in paragraph 6, that this land was unappropriated public lands of the United States, subject to settlement, entry and patent under the Homestead Laws of the United States. Then, in [fol. 281] answering the complaint, paragraph 6, the defendant admits "that in the months of September and October, 1901, the southwest quarter of the Northwest quarter of section three, township thirty-nine, N. R. 6 E. W. M. was unappropriated public land of the United States, subject to entry under the homestead laws."

Mr. Balmer: That is true.

The Court: That is 1901.

Mr. Balmer: We admit that it was subject to entry. What does every claimant have to prove when he enters it? He has to prove that he takes it up in good faith for the purpose of cultivating it and improving it and making it his home. Even though subjected to entry, if the testimony at the hearing shows that it is not agricultural land he cannot get any patent to it—even though subject to entry.

Mr. Whitcomb: Our allegation is that it is subject to entry and patent.

Mr. Balmer: Sure, if there be proper proof adduced as to the character of it. I admit it.

Mr. Whitcomb: What was the question?

(Question read as follows: Is the character of this land similar to the character of the land adjoining it?)

Mr. Balmer: Objected to on the grounds and reasons stated.

The Court: He may answer and you can cross-examine him.

Mr. Balmer: Exception.

A. Yes, sir.

Mr. Whitcomb: You can cross-examine.

[fol. 282] Cross-examination.

By Mr. Balmer:

Q. Do you know what the elevation of this land is at the north end?

The Court: You mean by that, is it level?

Q. Yes.

A. No, sir, I never took the elevation there.

Q. Do you know how much higher the elevation is at the south end than at the north end?

A. No, sir, I don't. I never took the elevation.

Q. It is a pretty steep hill, isn't it?

A. That is, part of it is steep, yes, sir. Part of it is steep.

Q. It is not suitable for agriculture until the timber is cut off; isn't that right?

A. No, sir.

Q. You know that in some 13 or 14 years of occupancy Mr. Reed has brought under cultivation about an acre?

A. Yes, sir.

Mr. Balmer: That is all.

(Witness excused.)

G. A. KING, a witness called for the plaintiffs, recalled on rebuttal.

Direct examination.

By Mr. Whitcomb:

Q. Mr. King, you testified yesterday?

A. Yes, sir.

Q. And you testified, as I remember, that you had been around [fol. 283] the boundaries of the northwest quarter of section 3, here in controversy?

A. Yes, sir.

Q. And my recollection is that you testified that you saw Mr. Tincker's notices?

A. Yes, sir.

Q. Now, did you see any notices posted upon trees, or placed upon trees of any claim of the St. Paul, Minneapolis and Manitoba Railroad Company to this land, or any portion of it?

A. No, sir.

Q. Are you acquainted with the character of the land included in Mr. Reed's homestead claim?

A. Yes, sir—considerably so.

Q. Have you been upon and over all of it or most of it?

A. The biggest part of it; yes, sir.

Q. Have you ever engaged in farming or agriculture?

A. A little bit.
Q. Have you owned land yourself?
A. Yes, sir. I own 83 acres now at Maple Falls. There is, I guess, three or four acres clear on it.
Q. Is this land, included in Mr. Reed's homestead claim, in section 3, suitable for agriculture?
A. Some parts of it is.
Q. How much of it is?
A. Well, the larger part of it is. The south 40s are steep.

The Court: Are what?
The Witness: Pretty steep—hilly. It would be rather difficult to cultivate it on that account.

Q. What about the other two 40s?
[fol. 284] A. The other two 40s are fairly good land, as I would call it. It is mountain land. You can raise most anything on it if you get sun on to it.
Q. Is this land of similar character to other land in the vicinity?
A. Yes, sir.
Q. In the immediate vicinity?

Mr. Balmer: Objected to.
The Court: Let him answer.
Mr. Balmer: Exception.

A. Yes, sir.
Q. Is it of like character as the land that you own yourself?

Mr. Balmer: Objected to as immaterial, irrelevant and on the ground that it is a collateral issue.
The Court: I do not know just what the object is in that. His land is some distance away I guess, too.

Q. How far away is your land from this?
A. I am in 30, and that is in—that would make it about two miles. It would be about two miles.
Q. Two miles?
A. Yes, sir; something like that. I am in 30-40, and this is in 3-39. I am west and north of that. My land is on the north side of the river, and it is a different class of land somewhat from what this is.
Q. In what respect is it different?
A. Why, it is a darker grade of land. We call it red land there and there are different grades of that, as I see it, the lighter grades being not as good land as the darker grades.
Q. Now, with respect to the amount of timber on it—how about [fol. 285] that, comparing yours and his?

Mr. Balmer: Objected to as irrelevant and collateral.
The Court: I do not see how it can be material.
Mr. Whitcomb: The Government has granted Mr. King a patent to his land up there—of the same character—homestead.

The Court: You were just talking about the character of the soil.

Mr. Whitcomb: If that issue is withdrawn from the case—if that issue is not in the case I do not care anything about the answer at all—the issue whether this land is such land as Mr. Reed would have a right to take as a homestead, why, I care nothing about it, whether he answers the question or not.

The Court: I provoked it by asking the question. I will sustain the objection as to that last question.

Mr. Whitcomb: That is all.

Cross-examination.

By Mr. Balmer:

Q. Now, Mr. King, when you were on the land I do not suppose you were particular to examine every blazed tree, were you?

A. Well, I was pretty near that. That was my business there, to see all them things, and if there was any new blaze or anything of that kind, I always went to it to see what it was.

Q. What interest did you have in looking for blazes on land that was claimed by Tincker?

A. Well, on the lines running through that country——

[fol. 286] The Court (interrupting): On account of your being a locator there, you mean?

The Witness: Yes, sir. I was locating people in there and I didn't want to locate one man on somebody else's claim.

Q. And when you got in there and knew that this was land that Tincker claimed, you did not figure on locating anybody else on that land?

A. Yes, sir. I figured on not locating them.

Q. And you would not pay any more attention to any notices around there. You would not look for any other notice?

A. If I saw any new blazes, I would go to it and see what it meant because the settlers that were located in there were changing hands. Maybe one man would come in, say, today and locate there, and go out and sell his claim and go back in again, or maybe he would go off and never return. I was looking after all those things.

Q. You would not say that there might not have been a blaze up there with some writing on it that you might have overlooked?

A. It is possible, of course, because I didn't look at every tree every time that I went up there.

Mr. Balmer: That is all.

(Witness excused.)

CHARLES W. REED, one of the plaintiffs, recalled on rebuttal.

Direct examination.

By Mr. Whitcomb:

Q. Mr. Reed, have you examined the trees about the boundary [fol. 287] of the northwest quarter of Section 3, in controversy here?
A. Yes, sir.
Q. Have you ever seen any notice blazed upon a tree or posted upon a tree of any claim of the St. Paul, Minneapolis and Manitoba Railroad to any part of that section?

Mr. Balmer: Objected to as incompetent, irrelevant and immaterial.
The Court: Let him answer.
Mr. Balmer: Exception.

A. No, sir.
Q. Mr. Reed, what is the character of the land included within your homestead claim?

Mr. Balmer: Objected to as not proper rebuttal and part of the plaintiffs' case in chief.
The Court: Well, that is a matter within the discretion of the Court and I will let him answer that.

A. Why, I have always found it productive. All that I have ever planted or improved has always proved to be productive. That is all I can tell you about it.
Q. What kind of soil is there on this claim?
A. It is black soil—a little shale rock mixed in it in places, but it is a soil that produces.
Q. Will you just describe the land to the Court please. I do not acre about the southwest quarter of the section particularly, but the northwest quarter.
A. Lot 4 and the southwest one-fourth there is quite a little level land up there—pretty fairly level, but when the creek runs it is kind of wide, in some places being about a quarter of a mile wide through there.
[fol. 288] Q. Is that a kind of valley?
A. Yes, sir.
Q. And this creek runs through both 40s, does it?
A. Yes, sir, it runs through both 40s and back on to the third one.
Q. And what is the character of the soil down in this creek bottom?

Mr. Balmer: Same objection to all this line of testimony.
The Court: Let him answer.
Mr. Balmer: Exception.

A. It is a dark loam soil, most of it.
Q. Is this land suitable for agriculture?
A. Well, it has proved that way to me.
Q. Is this land more valuable for agriculture than it is for timber?

A. I consider any land that you can produce stuff on is worth much more for agriculture than for timber, because timber is only one crop while agriculture is good for life. That is the way I look at it.

Q. You didn't answer my question. Is this land more valuable for agriculture than for timber?

A. I consider it is.

Q. What crops have you actually raised upon it?

A. Well, sir, I have raised most everything that grows in that part of the country. I produce everything that grows in that part of the country. I have raised all kinds of berries; strawberries included, and three or four different kinds of black berries, and I have raised cherries—three crops of cherries that I have got there, and I have got a crop of cherries there now, and I have raised about a ton [fol. 289] of potatoes. I cannot get my stuff out of there very good and so I never raise any more than I really need for my own use, because it is hard to get the stuff out of there.

Q. Have you raised all that you have need for you own use?

A. Yes, sir. I have got stuff canned there in the house today—all kinds of fruits and vegetables of all kinds. I never dragged spuds in there, only the first year that I was there, and I have had them all the time.

Cross-examination.

By Mr. Balmer:

Q. Mr. Reed, you have taken pictures of your garden tract, and your house and improvements around there at different times, have you?

A. Yes, sir, and you might just as well look at the improvements as at any of the other things that are up on the ranch. I have not got the pictures here.

Q. You did not bring any of those pictures down here for the trial?

A. No, sir.

Q. I spoke to you yesterday about bringing some in, and you told me of someone in town that had them.

A. I thought that one of my son-in-laws in town here had them, but he didn't have them.

Q. As I understand, the first occasion you were on this land to look at any of the corners was in 1906, wasn't it?

A. Yes, sir.

Q. And a pencil writing on a blaze on a tree, that had been put [fol. 290] there four years before, or so, would not be very legible, would it?

A. There ain't much chance for that. I looked these things over pretty close.

Q. Ain't much chance for what?

A. For to overlook anything like that.

Q. You don't think that it might have been weathered off in four years?

A. Well, I didn't see any that looked to me as an appropriate place to write anything on.
Q. You didn't see any writing?
A. No, sir.
Q. This land, in your opinion, is more valuable for agriculture than for timber?
A. Well, that is what I think of it, yes.
Q. And yet in 13 years you have cultivated only about an acre.
A. Well, I have got pretty good reasons for that.
Q. I am asking you the question, yes or no.
A. Yes, sir.

Mr. Balmer: That is all.

(Witness excused.)

EDMOND MAGNER, a witness called on behalf of the plaintiffs, recalled on rebuttal.

Direct examination.

By Mr. Whitcomb:

Q. You testified yesterday, Mr. Magner, in regard to this same land in controversy here, didn't you?
[fol. 291] A. Yes, sir.
Q. Have you seen the boundaries of the northwest quarter of section 3, in question?
A. Yes, sir.
Q. Have you been about those boundaries?
A. Yes, sir.
Q. Does your land adjoin this section 3 on the west?
A. Yes, sir.
Q. And this eastern boundary of the Reed land is your—this western boundary of the Reed land is your eastern boundary?
A. Yes, sir.
Q. Did you ever see any notice posted anywhere along this boundary of any claim of the St. Paul, Minneapolis and Manitoba Railway Company to any of this land?
A. No, sir.
Q. Did you ever see any blaze upon a tree upon which there was any such notice?
A. No, sir.
Q. Mr. Magner, are you acquainted with the character of the land included within Mr. Reed's homestead claim?
A. Well, it is very productive. I don't know of anything that he has planted that was not successful. It comes to maturity, the crops that he has planted.
Q. Is the land suitable for agriculture?
A. Yes, sir.
Q. Is the soil generally productive?

A. Yes, sir, so far as I have seen.

Q. Is the land of the same general character as your land, immediately adjoining it?

[fol. 292] A. Why, I should judge it was. It is adjoining it. I don't see how it could be different.

Q. You have acquired title, have you, to your land from the Government?

Mr. Balmer: Objected to as incompetent, irrelevant and immaterial and entirely a collateral issue, and not subject to trial in this case.

The Court: I do not think you can draw very much of a conclusion from that fact.

Mr. Whitcomb: I offer to prove by the witness, may it please the Court, that this land of Mr. Magner, which adjoins the land that is here in controversy, is the same character of land, and that it was open under the same law and that it has been patented.

The Court: We will let him testify as to its character, its fertility, and so forth, and what it is suited for.

Mr. Whitcomb: I wish to show by the witness that he has applied for his land as a homestead in the same manner that Mr. Reed applied for his, and that the Government has granted him a patent.

The Court: It showed up here yesterday, I think.

Mr. Balmer: It may have been referred to. I object to it as incompetent, irrelevant and immaterial and not proper rebuttal.

The Court: He homesteaded on the adjoining property there.

Mr. Balmer: That is part of the plaintiffs' case in chief.

The Court: The fact that he has proved up, or something of that kind. He has shown the general character of the land and if he can show the topography of the land there I think he is entitled to show [fol. 293] its productiveness there and that is all.

Mr. Whitcomb: Well, I understand then that he is not permitted to answer that?

The Court: I do not think that the fact that he has proved up with the Government would be of any material value to the Court.

Mr. Whitcomb: Please note my exception.

Q. What use do you make of your land, Mr. Magner?

A. I beg your pardon.

Q. What use do you make of your land?

A. I use it for agricultural purposes.

Q. You raise crops, do you, on yours?

A. Yes, sir. I raised wheat four feet six inches high. I took it up to Maple Falls, and it was on exhibition there for quite a while.

Q. In your opinion is the land included in the Reed claim more valuable for agriculture than it is for timber?

A. Why, I would say it was.

Mr. Whitcomb: You may cross-examine.

Cross-examination.

By Mr. Balmer:

Q. That is what you honestly believe, is it, Mr. Magner?
A. Sir?
Q. That is what you honestly believe, that Reed's land is more valuable for agricultural purposes than for timber?
A. Oh, yes, Reed's land is more valuable for agricultural purposes than for timber.
Q. At the present time?
A. Why, at all times. You can only get one crop of timber and [fol. 294] you can get years and years of agriculture if it is productive.
Q. That is the reason you think it is more valuable for agriculture than for timber?
A. Why, certainly.
Q. You know that at the present time there are about 160 acres of it in timber and about four acres not; is that right?
A. Well, four or five acres, but what is the cause of that?
Q. Well, you tell us what the cause of it is.
A. That man has been held up for 13 years there by a corporation.
Q. What is the cause of the timber being there?
A. He has not been allowed to remove it and to improve his land—bring it in cultivation.
Q. You didn't look at all the blazed trees around Reed's claim, did you?
A. Sir?
Q. You haven't looked at all the blazed trees around Reed's claim, did you?
A. Well, I have been over it lengthwise, crosswise and vice versa and from every angle, nearly, and all the blazes that there are there and noticed them to see if there was any pencil marks of any kind on them and also to see what they were there for, and I think I am pretty well acquainted with all the blazes on Mr. Reed's place.
Q. When was the first time you were up there—what year?
A. I was up there about August 15, 1906.
Q. 1906?
A. Yes, sir. I bought my place on the 18th of August. I got [fol. 295] there three days prior to that time to look at this property.
Q. You know that pencil writing on a tree might weather off in the course of four years, don't you?
A. Oh, no.
Q. It would not.
A. That is good for seven years in a good many instances.
Q. Lead pencil on a tree?
A. Yes, sir.
Q. On a blaze?
A. Yes, sir, on a blaze. We used to put it on a blaze for many years, and they stayed on for seven years.

Q. Where was that?
A. In California.
Q. There was not as much rain there, was there?
A. In Shasta County. I believe it rains more in a season.
Q. It is not as damp a country as this is?
A. Not very.

Mr. Balmer: That is all.

(Witness excused.)

Mr. Whitcomb: Your Honor, I wish to offer in evidence the plaintiffs' exhibits marked for Identification E, F, G, H, I, J and K.
The Court: Any objection to this offer?
Mr. Balmer: No.
The Court: Let them go in.

(Whereupon documents were admitted in evidence and marked Plaintiffs' Exhibits "E" to "K" inclusive.)

Mr. Whitcomb: They are copies of documents from the Land [fol. 296] Office in the Interior Department.
Mr. Whitcomb: I want to put this booklet in evidence.
Mr. Balmer: I have no objection to the introduction of this. I do not admit the competency of the Land Department Regulations to alter the law on the subject, but I have no objection to this going in to show what the Land Office's constructions of the laws are.
Mr. Whitcomb: It is circular number ten of the Department of the Interior, in the Land Office. I will have it marked.
The Court: It will be admitted.

(Booklet referred to admitted in evidence as Plaintiffs' Exhibit "L.")

Mr. Whitcomb: We rest. Of course, we will have a right to put in the documentary evidence that will come from Washington.

Plaintiffs rest.

Mr. Balmer: We rest.

Defendants rest.

Testimony closed.

(Argument by counsel on respective sides.)

[fol. 297] COLLOQUY BETWEEN COURT AND COUNSEL

November 30, 1920.

Court convened pursuant to adjournment.
All parties present.
Mr. Whitcomb: May it please the Court, this matter is here this morning upon motion of the plaintiff for leave to produce W. J.

Tincker and Pearl Tincker, his wife, and C. W. Reed as witnesses testifying to the writing of a letter to the Department of the Interior and the receipt of an answer thereto from the Department, and as to the contents of these letters in regard to the withdraw-l of the land that is in question in this suit and the settlement upon the same.

If the Court will remember, at the time we tried the case, and Mr. Tincker was a witness, we undertook to introduce evidence in regard to the receipt of this letter from the department, and the writing of a letter by the Tinc*h*ers, and it was objected to as not best evidence and the Court at that time stated that he thought there probably were in existence copies of this correspondence in the Department of the Interior and agreed to give us an opportunity to secure copies, if possible. We have a transcript of the testimony that shows just what transpired.

The Court: You mean the testimony of the contest in the land department?

Mr. Whitcomb: No. I have a copy of the testimony taken here on the trial, in regard to this incident.

The Court: I see.

Mr. Whitcomb: And after we concluded the hearing why I immediately, as attorney for the plaintiffs, wrote to Washington to secure copies of this correspondence and also of all orders of with-[fol. 298] draw-l of this land from entry and restoration which it has also been stipulated might be supplied. That is filed, Mr. Balmer, and you have a copy of that.

Mr. Balmer: Yes.

Mr. Whitcomb: Now, we have secured copies of everything that we could find or that could be had in Washington, but we were unable to find any copies of either the letter from the Tinckers or of the answer to them, and for that reason we ask now to produce this secondary evidence of the contents of those letters and we have Mr. and Mrs. Tincker and Mr. Reed here for the purpose of testifying as to the contents of those letters.

The Court: Where were those letters directed, and where would they go in the ordinary course of mail?

Mr. Whitcomb: To the Department of the Interior I think—to the Secretary of the Interior.

The Court: It was not in the local land office then?

Mr. Whitcomb: No, it went to Washington. I have here my letter to the attorney who made the search in Washington and the letters from him when he returned these other matters. This record is getting to be very large, and I do not want to encumber it any more than is necessary. I have no objection to putting those in if it is desired that they be put in. I think Mr. Balmer has made search too for the papers in the Land Office that have to do with this question. We have a bunch of them here that are immaterial to any issue in this case, as far as I can tell, and I think Mr. Balmer thinks the same thing.

The Court: Letters that were written in the course of business [fol. 299] concerning this land?

Mr. Whitcomb: These have something to do with the lands up

in that part of the country, but I cannot see that they are in any way material to this case. We have some letters here that are in the files——

Mr. Balmer (interrupting): Now, in connection with those, Mr. Whitcomb, just to keep the record clear, did you have those marked as exhibits by the reporter?

Mr. Whitcomb: I do not think they were marked by the reporter. I think we had better get those out and offer them in the regular way.

The Court: They are not filed in the case, are they?

Mr. Whitcomb: I brought these over just as soon as I got them, so there was no way of introducing them in evidence I brought them over and filed them.

I now offer in evidence plaintiffs' identified exhibit "M," consisting of certified copy of certain letters from the Department of the Interior at Washington to the Register and Receiver of the Land Office at Seattle, certified to by the Assistant Commissioner of the General Land Office.

Mr. Balmer: To which the defendants object upon the ground that the documents are irrelevant and immaterial, it appearing that there was no withdrawal of the lands in controversy at the time of the alleged settlement upon them or at the time of the inception of the claim to them made by Tincker, or for a considerable time thereafter; that they do not excuse nor tend to excuse the said Tincker from failing to take up an actual residence upon the land, and furthermore, the orders of withdrawal so made subsequent to [fol. 300] the inception of the alleged Tincker claim by their own terms provide that they shall not affect any bona fide settlement or valid claim upon the lands initiated prior to the dates of the orders of withdrawal.

The Court: I have not time now to go through all these and determine just what they mean. They are in the record when they are offered, anyhow. I will let them go into the record and I will determine what effect, if any, they may have and what purpose they may serve when I come to consider the whole record.

Mr. Balmer: Note our exception.

The Court: Let it be noted.

(Whereupon correspondence referred to was admitted in evidence and marked Plaintiffs' Exhibit "M.")

Mr. Whitcomb: I will take the stand myself.

WALTER B. WHITCOMB called as a witness on behalf of the plaintiffs, having been first duly sworn, was examined and testified as follows:

My name is Walter B. Whitcomb. I am one of the attorneys for the plaintiffs in this cause. Immediately after the hearing heretofore had in this case and on the 25th day of June, 1920, I wrote to

Watson E. Coleman, an attorney at law at Washington, D. C., who was familiar, through previous transactions, with the land here in controversy and the records thereof in the United States Land Office, a letter, a copy of which is plaintiffs' identified exhibit "N"; and in response thereto I received from the said Watson E. Coleman a letter dated July 7, 1920, plaintiffs' identified exhibit "O," and another letter from Mr. Coleman, dated July 20, 1920, plain-
[fol. 301] tiffs' identified exhibit "P," which accompanied plaintiffs' identified exhibit "M." "P" came at the same time "M" did.

The Court: "M" is the other exhibit, being matters of the Land Office, Department of the Interior; is that right?

Mr. Whitcomb: Yes.

The Court: A certified copy?

Mr. Whitcomb: Yes. We offer these three identified exhibits "N," "O," and "P" in evidence.

The Court: What is your object in this?

Mr. Whitcomb: They show diligence and that we have been unable to find the originals.

The Court: And want to offer secondary evidence?

Mr. Whitcomb: Yes.

Mr. Balmer: The defendants object to these letters, and each of them, on the ground that they are irrelevant, immaterial and incompetent, and upon the ground that they are not the best evidence of the inability of the plaintiffs to procure the alleged correspondence. I understand that they are offered in evidence as part of the foundation for the introduction of secondary evidence of the contents of certain correspondence which is alleged to have passed between Mr. and Mrs. Tincker and the Secretary of the Interior and the General Land Office.

The Court: Why did you not have the Department certify that there was or was not correspondence of this character on file, Mr. Whitcomb? That is the question that occurs to the Court in view of this objection.

Mr. Whitcomb: Well, it might be impossible, your Honor, to get them to certify that there was no such thing.

[fol. 302] The Court: Have you a certified copy of all the correspondence in the matter, putting it the other way around? If you have then you have that by the process of elimination. One way or the other *other.*

Mr. Whitcomb: Their certificate does not show that it is a certified copy of everything in connection with it. These letters that I have produced show that Mr. Coleman got certified copies of everything. I think that is his statement in his letters, that he had certified copies and that these are——

The Court (interrupting): He is not a man clothe- with authority.

Mr. Whitcomb: No, sir, he is not.

The Court: In that department.

Mr. Whitcomb: No, sir. He was an attorney in this case for us.

The Court: I think there would be two ways. This is objected to, and it is a technical proposition. I think there would be two ways of meeting this matter. One would be by offering, if you can get it, a

certificate that no letter of the date and character that you claim was ever received or filed, or, at least, not filed. Another would be a certified copy of the whole correspondence, which would show on its face whether it included this or not. That is the way it strikes me. I am inclined to think that if counsel objects you will pretty near have to do something of that kind.

Mr. Whitcomb: May it please the Court, I think the answer to that is that we have secondary evidence that we got it, and when these witnesses testify that they lost that letter or have destroyed it— [fol. 303] —cannot be found—one way to prove the contents of it is to have them swear as to what it contains——

The Court (interrupting): That is what you propose to prove, a letter from he Department to these people?

Mr. Whitcomb: To Tincker, and the letter is gone. Mrs. Tincker will testify that she destroyed that letter, and now she offers to testify as to what it contains.

The Court: Your objection then is that the Government would have the duplicate of it?

Mr. Balmer: Yes.

The Court: I do not know but what that is a different proposition. I thought he was going after the letters that went in from this end.

Mr. Balmer: One of those is referred to in the affidavits in support of the motion to re-open the case—a letter from Mr. or Mrs. Tincker to the General Land Office and a reply from the General Land Office to the writer of that first letter. Now, it is manifest that the original of the Tincker letter should be in he files of the Department of the Interior at Washington, and it is so generally known that I think the Court can take judicial knowledge of the fact that the Department of the Interior preserves copies of all the correspondence that it writes.

The Court: I understand so.

Mr. Balmer: Therefore it seems to me that in order to lay the foundation for this oral evidence as to the contents of these letters the proper course must necessarily be to prove by some competent witness that the original of one and the duplicate of the other, which [fol. 304] would be on file in the Department of the Interior, are not there.

The Court: I do not know about the duplicate. On the other I am inclined to think that you are correct.

Mr. Balmer: Well, I feel that I am correct on both.

The Court: That, I apprehend, is the practice, and if it be the practice that would not change the rule with respect to the reception of evidence.

Mr. Balmer: I don't know that I understand the point that your Honor is just making.

The Court: I will allow evidence to go in respecting the letter received—not the one sent.

Mr. Balmer: You mean received by the Tinckers?

The Court: Yes. I think I will hear evidence on that.

Mr. Balmer: Well, I would feel constrained to save an exception.

The Court: Yes.

Mr. Balmer: That, in view of the inferior quality of the evidence which is offered and of the fact of which the Court should take judicial notice, that there is a better quality of evidence probably accessible, the burden rests upon the plaintiff to show that the carbon or other copy of letter written from the Department of the Interior to Tincker is not accessible, and that showing should be made by some competent witness connected with the department of the Interior and able to testify concerning its files. I merely ask for the enforcement of the rule that a litigant must always offer the best evidence which the nature of the case will admit.

The Court: Well, as I understand, the plaintiff desires now to offer evidence of a secondary character touching the contents of the [fol. 305] letter which he says this witness received from the Interior Department?

Mr. Whitcomb: Yes, your Honor.

The Court: And offer to show that the original was destroyed?

Mr. Whitcomb: Yes, sir.

The Court: I do not think that the objection, that he ought to try to produce a copy, on the theory that the Department has it, would be good. I think that there ought to be something to show, however, that any letter that he wrote to the Department is not there.

Mr. Balmer: Exception.

Mr. Hamilton: If any objection of that kind is raised as to there being any better evidence than that to be offered, they have the opportunity to show to this Court that there is better evidence.

The Court: That thought occurred to the Court. I will not hurry this matter. If here be any more correspondence in the Department at Washington, we will let you get it. That ruling excludes one and admits everything respecting the other that can be shown cannot be produced. I would be pleased to give you gentlemen, after taking this matter under advisement, an opportunity to get anything that is in existence that might throw light on this case.

Mr. Whitcomb: That is all I have to say as a witness.

Mr. Balmer: I have no cross-examination.

(Witness excused.)

Mr. Whitcomb: We will offer these exhibits in evidence.

The Court: You mean those letters from the attorney?

Mr. Whitcomb: Yes, sir, from me and from him.

The Court: Any objection?

[fol. 306] Mr. Balmer: I make the objection that I previously made.

The Court: I do not see where they are material in this case. They are in the record, of course, for the purpose of review. I do not see where they are material or why they ought to be admitted over objection.

(Correspondence sought to be admitted and admission of which was denied by the Court is as follows:

"PLAINTIFF'S IDENTIFIED EXHIBIT N

June 25th, 1920.

Mr. Watson E. Coleman, Atty., Washington, D. C.

DEAR SIR: You appeared as attorney for Charles W. Reed, of Maple Falls, near here, in a contest before the United States Land Office, with reference to the S. W. ¼ of the N. W. ¼ of Section 3 Township 39 North Range 6 East, which was patented to the Great Northern Railway Company, successor to the St. Paul, Minneapolis & Manitoba Railway Company in 1908, and to which Reed made claim as a homestead.

On behalf of Reed I instituted suit to have the Railroad Company declared a trustee of the title to this land for the benefit of Reed, on the ground that the same was obtained fraudulently by reason of false affidavit of Thomas R. Benton, made in 1902, in support of selection list of the railroad company to this land, and upon the ground that the patent was issued by the Land Office by a mistake, and the said action is further based upon the title by adverse possession in Reed.

The cause has been presented to the court and we have found it advisable to submit to the court proof of one or two facts, which none of us were able to establish from the records in the Land Office at Seattle, and I am writing to you at Mr. Reed's suggestion to ask you to secure for him and send to me the documents required.

This land was first settled upon in September or October, 1901, by one W. J. Tincker, who marked his boundaries and in the following spring started to build a cabin. He says he desisted for the reason that the ground was thrown into a reserve, and that he wrote to the Land Office to ascertain what effect this would have upon this claim, and he says that he received a letter from them to continue his occupancy and that they thought this land would be set out from the reserve. I thought from what Tincker said at first that this land was drawn into a forest reserve, but the Forestry Office [fol. 307] here does not think that to be the case. Then I observed that it appeared to have been withdrawn as coal and mineral land and then the withdrawal cancelled. I am inclined to think now that it has been withdrawn and restored more than once.

What I wish now is that you secure for us certified copies of any letters that there may be in the Land Office from or to W. J. Tincker in regard to this land, and second, that you secure for us the information as to when this land was withdrawn, for what purpose, and when restored. This last evidence is material as showing excuse for Tincker's failure to establish residence on the land. I don't know what shape this record will be in when you find it, but I wish documents certified in shape that I can use them in court. The attorney for the railroad company is not inclined to make

technical objections but I presume the thing needed is copies of the orders or letters withdrawing and restoring the land, and as I have said above I think there are several of them.

I wish to add that I am in a good deal of a hurry for this because the case has been tried and it is very likely that the case will be appealed whichever way it is decided in the lower court, and it is desirable from all points of view that this evidence be submitted at the earliest possible date.

If you will please secure this and send it to me, together with your bill, I will have Mr. Reed remit to you at once.

Very truly yours," —— ——. WBW-Me.

"PLAINTIFF'S IDENTIFIED EXHIBIT O

Watson E. Coleman,

Attorney and Counselor at Law,

Pacific Building

Washington, D. C., July 3, 1920.

Walter B. Whitcomb, Esq., Bellingham, Washington.

DEAR SIR: Replying to your letter of June 25th requesting copies of certain papers in connection with the land claimed by Charles W. Reed, would state that I have been able to locate a part of the papers you desire but so far have not been able to find any letter from or to the Mr. W. J. Tincker but will make a further search for the same. However, I have already ordered copies of such papers as can be found and the preparation of the same has been made special by the Land Office but it will require at least five or six days before they are ready. In the meatime I will endeavor further to find letters from Mr. Tincker and include them also.

[fol. 308] "As soon as the copies are ready I will forward the same to you.

Yours very truly, Watson E. Coleman."

"PLAINTIFF'S IDENTIFIED EXHIBIT P

Watson E. Coleman,

Attorney and Counselor at Law,

Pacific Building

Washington, D. C., July 20th, 1920.

Walter B. Whitcomb, Esq., Bellingham, Washington.

MY DEAR SIR: Under separate cover I am sending you copies of papers desired in connection with the matter of Charles W. Reed. The Land Office was not able to locate an Order of July 26, 1906 but did find a modification of the same to apply to coal entries, dated December 17, 1906. Also the Office was unable to find a report as non-coal in part of 1908 and a clear list as to coal of March 8, 1909. Furthermore, the Office was not able to find any letters of Mr. W. J. Tincker in regard to the land. However, the copies I am sending you show numerous withdrawals affecting the land a good part of the time since Mr. Reed claims that settlement was made upon the same.

The fee, including the cost of the copies, is $25.

If I can be of any further service to you at any time I shall be glad to do so.

Yours very truly, (Signed) Watson E. Coleman."

Mrs. PEARL G. TINCKER, called as a witness on behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Whitcomb:

Q. Mrs. Tincker, where do you reside?
A. 2638 Xenia Street.
[fol. 309] Q. In Bellingham?
A. Yes, sir.

The Court: Out in Eureka?
The Witness: Yes, sir.

Q. You are the wife of W. J. Tincker?
A. Yes, I am.
Q. Have you any acquaintance with the land involved in this suit?
A. I have.
Q. The S. W. ¼ of the N. W. ¼ of Section 3, Township 39, North Range 6 East?

A. I have. My husband took it up as a homestead at one time.
Q. Did you ever see a letter from the Department of the Interior in regard to this land, directed to your husband, or yourself, about the year 1903?
A. I wrote one, and received a reply.
Q. When you received—when did you receive this reply?
A. Not the exact date, I cannot give that. It was some time in the early summer of 1903.
Q. From whom did it come?
A. From the Department of the Interior—the Land Office.
Q. To whom was it written?
A. It was written to me personally. Not to Mr. Tincker, because I wrote the letter myself.
Q. You were the wife of Mr. Tincker at that time?
A. Yes, sir.

The Court: You say this was in the early summer?
The Witness: This was in the early summer, probably May.
The Court: 1903?
[fol. 310] The Witness: Yes, sir.

Q. Where is that letter?
A. I destroyed it. Mr. Tincker wore it out in his pocket and there were just three or four threads of it left.
Q. When did you destroy it?
A. I destroyed it when we lived in Sumas. It was in 1912, I think, or somewhere thereabouts.
Q. Do you know if anyone else ever saw the letter?
A. I know that it was shown to Mr. Reed and that Mr. Reed read it, and several others too.
Q. Did Mr. Tincker ever see it?
A. He certainly did.
Q. Do you know the contents of the letter?

Mr. Balmer: Just answer that by yes or no.

A. Yes, sir.
Q. What did it say?
A. It——

Mr. Balmer (interrupting): Now, just a moment. I object to the question upon the ground that it does not call for the best evidence, and that no proper foundation has been shown, and no sufficient reason given, for the introduction of secondary evidence of the oral character for which this question inquires.
The Court: The objection is overruled.
Mr. Balmer: Exception.
The Court: Note it.
The Witness: Now, I will tell the contents of the letter?
The Court: Yes.
The Witness: In reply to yours making inquiries as to whether Section 36 and 30—well, I am indefinite about the sections—39-6, [fol. 311] I think, would be reserved as coal, will say that one

making a homestead entry has prior right over coal, and that if we made an honest effort to establish a home that we could have our homestead rather than coal, or something of that sort, and that we would be kept posted, and later we did receive a pamphlet relating to the coal and mineral laws, but no letter—nothing further. The reason I wrote the letter was because of an article which was printed in the Bellingham papers at that time, declaring that this land was to be withdrawn for coal entry.

Mr. Whitcomb: You may take the witness.
Mr. Balmer: No questions.

(Witness excused.)

W. J. TINCKER, a witness on behalf of the plaintiffs, recalled.

Direct examination.

By Mr. Whitcomb:

Q. Mr. Tincker, you heard the testimony of Mrs. Tincker in regard to a letter from the Department of the Interior, did you not, just now?
A. Yes, sir.
Q. Do you know whether there was such a letter?
A. Yes, sir.
Q. Who received the letter?
A. It came to the house. She received it. She wrote it, and the answer came to her home.
Q. Do you know what became of it?
[fol. 312] A. Why, it was destroyed. The last time I ever saw it was when Mr. Reed read it. That was the last time I ever saw the letter, and then it was put away some place—in a box I think it was, or she was going to put it in a box, and finally she made kindling of the whole thing. She said, "This will do no good—papers 23 years old will do no good," and I think she burned them up.
Q. Do you know what the contents of that letter was?

Mr. Balmer: Just answer that by yes or no.

A. Yes, sir.
Q. What did it say?

Mr. Balmer: The defendants object upon the grounds that the question does not call for the best evidence and no proper foundation has been laid, and no sufficient reason has been given for the introduction of secondary evidence.
The Court: The objection is overruled.
Mr. Balmer: Exception.

A. Why, it said—she asked about the land—she wrote about the land. She saw it in the paper that it was going to be withdrawn for coal entry, and we wrote to find out. I was not going to bother about

it if that was the case, and they wrote something to the effect that it was not reserved for any coal entry then and we had a prior right if there was mineral on it—that we had a prior right providing that we made actual settlement and had our home on it. Something to that effect. Just as she said, they were to keep us posted, but they did not. They just sent us copies of the coal and mineral laws, and then that was the end of it. That was all the information we ever [fol. 313] received from the land office in regard to that matter.

Mr. Whitcomb: That is all I think.

Mr. Balmer: Just one question I want to ask.

Cross-examination.

By Mr. Balmer:

Q. Do I understand that you say that the contents of this letter were the same as Mrs. Tincker just testified?

A. Yes, sir, just about the same—I cannot just exactly remember, because I didn't pay any attention to it after I read it as she did, and Mr. Reed had it afterwards, and that comes pretty near to the contents of it. I didn't bother about it.

Q. Mrs. Tincker was the one that wrote to the Secretary of the Interior?

A. Yes, sir, she wrote to him.

Q. And the reply came to her?

A. Yes, sir. It was addressed to Mrs. Tincker, I think. I don't know who the reply came to. She knows.

Q. You didn't have any correspondence yourself with the Department of the Interior, or the General Land Office?

A. Only just my wife writing. My wife did most of the writing on that.

Q. And this letter from the Department of the Interior said that if you made a valid settlement on the lands prior to the time it was withdrawn on account of containing coal, that your settlement would be good?

A. Yes, sir, providing that there was no settlement at all on the place.

Mr. Balmer: That is all.

(Witness excused.)

[fol. 314] C. W. Reed, one of the plaintiffs, recalled.

Direct examination.

By Mr. Whitcomb:

Q. Mr. Reed, you heard the testimony of Mrs. Tincker and Mr. Tincker in regard to a letter from the Department of the Interior in regard to the land in question here?

A. Yes, sir.

Q. Did you ever see such a letter as that mentioned by Mrs. Tincker?

A. Yes, sir.

Q. Where did you see it?

A. At Ten Mile, up here.

Q. When?

A. 1910.

Q. How did you come to see it?

A. Why, when I bought the improvements there from Smith I asked him who made these old improvements. I would not pay him until he told me, and he told me that they were Tincker's. He said "Tincker made this trail and started this cabin," and he said, "This is Tincker's cabin and he will never trouble you about that because I paid him for it." That is why I asked for the letter.

Q. Did you read the letter?

A. Yes, sir.

Q. Who had it when you saw it?

A. Well, Mrs. Tincker presented it to me. Her and Mr. Tincker both stood there, and we all read it over several times and we commented on it.

[fol. 315] Q. Do you know the contents of that letter?

A. Well, pretty much.

Mr. Balmer: Just state—well, all right. The point is, you can state what sort of a recollection you have about the contents of the letter, but do not attempt at this time to state what the contents were.

The Witness: Well, they had written to know in regard to their homestead; that is the way the letter read. If they would be allowed to hold——

Mr. Whitcomb (interrupting): Just a minute. We want to get the record straight. Mr. Balmer wants to make an objection to your testifying about the contents. Now, I want to know if you do have a recollection of what the letter stated.

The Court: Answer that by yes or no.

The Witness: Yes, sir.

Q. What did it say?

Mr. Balmer: I object to that upon the ground that the question does not call for the best evidence, and no proper foundation has been laid for the introduction of oral evidence as to the contents of the letter in question.

The Court: We will let him testify.

Mr. Balmer: Exception.

The Court: Note it.

A. Why, it stated that this land would be withdrawn for coal purposes and mineral purposes, and if they had made prior rights, prior to this withdrawal, that their homestead would hold good, providing that they complied with the law, and it also stated that they would keep them posted in regard to what action the department would [fol. 316] take about this land, and they said something or other

about setting it out, but I cannot state that just the way it was—I would not attempt to—set it out of the reserve or something. I don't know as to that. I would not attempt to state it. Mrs. Tincker said something about that, but I would not attempt to state that.

Q. What was done with the letter after you read it?

A. Sir?

Q. What was done with the letter after you read it?

A. Why, they kept it. I left it with them. I called there to get Mr. Tincker's affidavit. That is the way I came to see the letter. While there he said "I have got a letter from the Department," and he showed it to me. So I didn't suppose I would need the letter when I put it in his affidavit.

The Court: Was somebody with you?

The Witness: Sir?

The Court: Was somebody with you—some notary?

The Witness: No. Just us three were present at the time.

The Court: You said that you went there to take an affidavit and I suppose you had it notaried, did you not?

The Witness: We had taken it to Lynden and had it made out. We had it made out before Sampley. He can testify about that. We went from Ten Mile up to Lynden, and Mr. Sampley made out the affidavit. He is here in Bellingham. He will recollect it.

Mr. Whitcomb: You may cross-examine.

[fol. 317] Cross-examination.

By Mr. Balmer:

Q. This letter, as I understand you, Mr. Reed, said to Mr. and Mrs. Tincker that if they had made a valid settlement on this land, or had a bona fide claim to it, the fact that it might be withdrawn later on for coal purposes would not affect their rights?

A. Yes, something like that—well, if they had made a prior right to the coal withdrawal. That is the way it read.

Q. Made a prior right before the coal withdrawal?

A. Yes, sir, it would not affect their fitness as a homestead.

Q. It would not affect their claim?

A. No, sir, it would not.

Q. Do you recollect the date of that letter?

A. Well, it was dated in 1903, but I would not recollect the month. It was in 1903. I am sure of that.

Q. And where was Mr. Tincker living at that time?

A. Ten Mile.

Q. Ten Mile?

A. Yes, sir.

Q. Where is Ten Mile?

A. That is up toward Lynden.

Q. Up where?

A. Between here and Lynden—that way (indicating.)

Mr. Tincker (interrupting): No, we were not living in Ten Mile at that time. That is where you saw the letter, though. That was not the year when we lived in Ten Mile.

The Court: Now the question was, at the time you saw the letter [fol. 318] where were they living?

Q. At the time you saw the letter where were the Tinckers living?

Mr. Tincker: We were living in Ten Mile.

A. They were living in Ten Mile.

Q. They were living in Ten Mile?

A. Yes, sir.

Q. How far is Ten Mile from this homestead?

A. It is quite a ways. Smith had the homestead a long time before that.

Q. This was in 1910?

A. I guess I am mistaken about that. Smith was there afterwards. I was mixed up. No, they were in Ten Mile, that is right, but Smith had nothing to do with it. Oh, yes, he had had, too. Excuse me.

Q. When you saw this letter it was in 1910, wasn't it?

A. Yes, sir.

Q. You saw this letter in 1910?

The Court: That is what he said.

Q. Isn't that what you said?

A. Yes, sir.

Q. And the Tinckers had sold out to Smith some time around 1906?

A. Yes, sir; that is right. I got it wrong in my dates. It was on Smith's account that I went to see Tincker.

Q. Then after you had seen Mr. Tincker on that visit you took him over to the law office of Mr. Chas. B. Sampley at Lynden?

A. Yes, sir.

Q. And he made an affidavit then in support of your homestead [fol. 319] claim to this land?

A. In support of my homestead claim, but he made the affidavit that he had taken the homestead at a certain time, and what he had done there.

Q. He didn't say anything in that affidavit about this letter, did he?

A. I had seen the letter before he went to make the affidavit.

Q. What?

A. I had seen the letter before he went to make the affidavit.

Q. But in this affidavit that you got him to make before Mr. Samply he didn't say anything about this letter from the Secretary of the Interior?

A. No, I didn't ask him about that then.

Mr. Balmer: That is all.

(Witness excused.)

Mr. Whitcomb: Nothing further.
Plaintiff Rested.

The Court: Anything on the part of the defense?
Mr. Balmer: No.
The Court: In view of the fact that evidence has been given here by Mrs. Tincker it might possibly be a good idea to investigate further with the purpose of securing correspondence in the hands of the Government. Presumably that would be filed in the same matter and there might be some way of reaching it there under an index system—in view of this evidence, and the objection follow-
[fol. 320] ing it, that might bring us what we want; that is, the original on the part of the one party and possibly duplicates on the part of the other.
Mr. Balmer: I might make this suggestion. The objections that I have made to the secondary evidence I have felt constrained to make, although they are somewhat technical, but I think that when a man is objecting to the quality of the evidence he has to be rather careful of his record. I doubt whether Mr. Whitcomb by correspondence with any one, either in the Department at Washington or outside of it, could develop anything more definite than he has. That has been my own experience, but I think that if this court would make an order requesting the Secretary of the Interior to furnish a certificate as to whether or not such correspondence can be found——
The Court (interrupting): Either on that matter or any other, giving the names.
Mr. Balmer (continuing): Yes, sir, and whether or not a search has been made of the file in which this correspondence would ordinarily be put way—in other words, a request for a certificate as to whether a competent witness in the department has looked in the proper files and whether or not he found the correspondence, I think we could get it.
The Court: I would be glad if counsel would prepare such a request for me to sign it, and he can forward it.
Mr. Whitcomb: We would be glad to have it made.
The Court: And in that you can show that this correspondence that you claim you had was between the wife of the entry man, or the squatter, and the department. Squatter rights you are claiming,
[fol. 321] are you not?
Mr. Whitcomb: Yes, sir.
The Court: I think that we can take that little time to get that information without hurting anybody now. I notice that you have a transcript of the other testimony, and it would not take very long to transcribe the proceedings taken here this morning, and the Court then could refresh his mind from the record.
Mr. Whitcomb: I want to recall Mrs. Tincker on one proposition.

Mrs. Pearl G. Tincker, a witness called on behalf of the plaintiffs, recalled.

Direct examination.

By Mr. Whitcomb:

Q. Mrs. Tincker, when you wrote this letter to the Secretary of the Interior, how did you sign it?

A. I don't remember whether I wrote it for him, or signed my own name. I have written letters for him and put at the bottom "By Mrs. W. J. Tincker."

Q. Or you might have signed it "Mrs. W. J. Tincker."

A. Or I might have signed it "Mrs. W. J. Tincker." I am not positive as to that. That is a long time ago. We didn't place very much importance on that.

Mr. Balmer: Did you ever sign any letters "Pearl Tincker," or "Pearl G. Tincker?"

The Witness: No, I don't think I ever did.

(Witness excused.)

Testimony closed.

[fol. 322] Mr. Whitcomb: We will be glad to prepare such an order.

The Court: Let the understanding be this morning that this case is concluded excepting this one matter, and the Court will re-open the case, if either side has anything pertaining to it, just for that one purpose, and subject to that one condition the case is submitted on briefs, and will be submitted in any event on written briefs, and I suggest that as soon as you find out what the record shows, the parties get their briefs in. The plaintiff may get his brief in within ten days after that time, and then counsel on the other side may have ten days to answer, and then you can take two or three days to furnish citations, and if you have anything in the way of a reply brief, you need not write the brief but simply hand the Court the citations and hand the other side copies.

[fol. 323] In Superior Court of Whatcom County

Order Settling Statement of Facts

I, Ed. E. Hardin, one of the Judges of the Superior Court of the State of Washington in and for the County of Whatcom, and the Judge before whom the foregoing cause was tried, do hereby certify that the matters and proceedings contained in the foregoing statement of facts are matters and proceedings occurring in said cause, and the same are hereby made a part of the record therein; and I do further certify that the same contains all the material facts, mat-

Notice [redacted]

Know all Men by These Presents that I the undersigned a citizen of the United States of America have this the 24th day of November A.D. 1906 Made an Homestead Entry by Purchase of all Prior Rights by Virtue of the Homestead Laws made and Provided in such Cases. the following described Lands to wit Lying the East ½ and the Southwest ¼ of the North West ¼ and the West ½ of the South West ¼ of Sec 3 in Township 39 North Range 6 East W.M. in what Comprises the State of Washington according to the Government Survey

Chas. W. Reed

Case No. 13711

Witnesses:

W. J. Sinclair

W. M. Smith

G. M. Mercer

Pltf's Exhibit No. "A"

Marked for Identification

Admitted

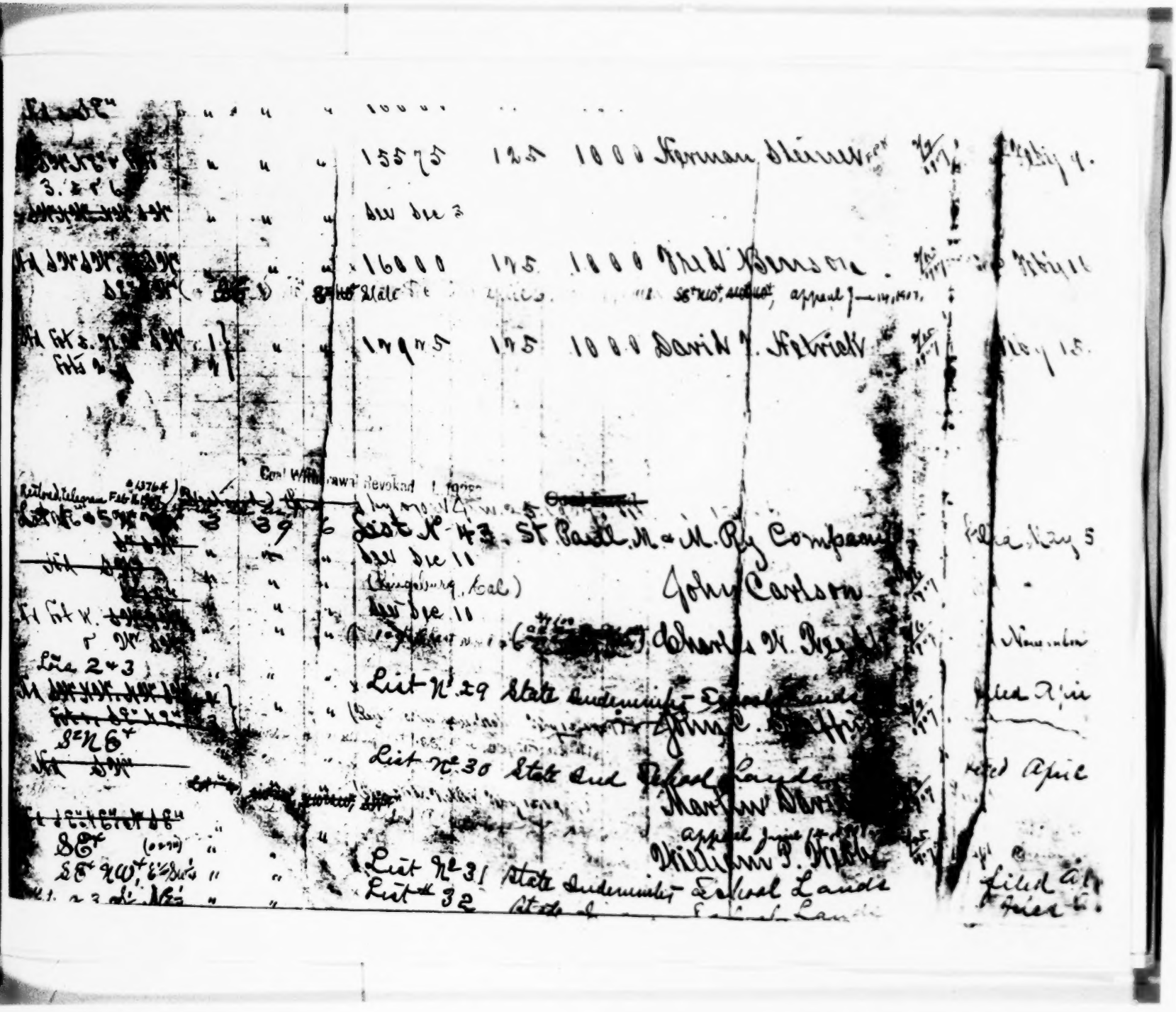
G. P. Kincaid Deputy Clerk

[illegible]

DEC 24 1906

GEO. M. COOK

By G. P. Kincaid



May 9. 1907 1911 4H / Final Ctf. #7931. June 20. 1907. November 29, 1909 Pat. No. 92 24

May 16. 1907 0310 1907 / March 12, 1814. Patent 703816 94, 1 (Supplemental patent for coal Nov. 5, 1907)

May 15. 1907 1951H / Final Ctf. #7932. June 30. 1907 May 24. 1907 No. 63 842

May 5. 1907 (See 0147 as to suit pending). Apr. 13, 1908. Act. No. 29 Case 238

Compiled see letters 1855 and 1858 Entries 37 Case 238

Case 238

April 6. 1907 0270 Land approved

April 6. 1907

0271

Filed April 6. 1907 0271 Land approved

[illegible]	3	"	"	Asst Sec'y
[illegible]	3	"	"	
[illegible]	3	"	"	
[illegible]		"	"	
[illegible]		"	"	
[illegible]		"	"	
[illegible]		"	"	
[illegible]		"	"	
[illegible]		"	"	
[illegible]		"	"	

Henry H. Barrett 3/4/07

Perry Van Epps 3/4/07

David P. Castor 3/4/07

Charles Kinman 3/4/07

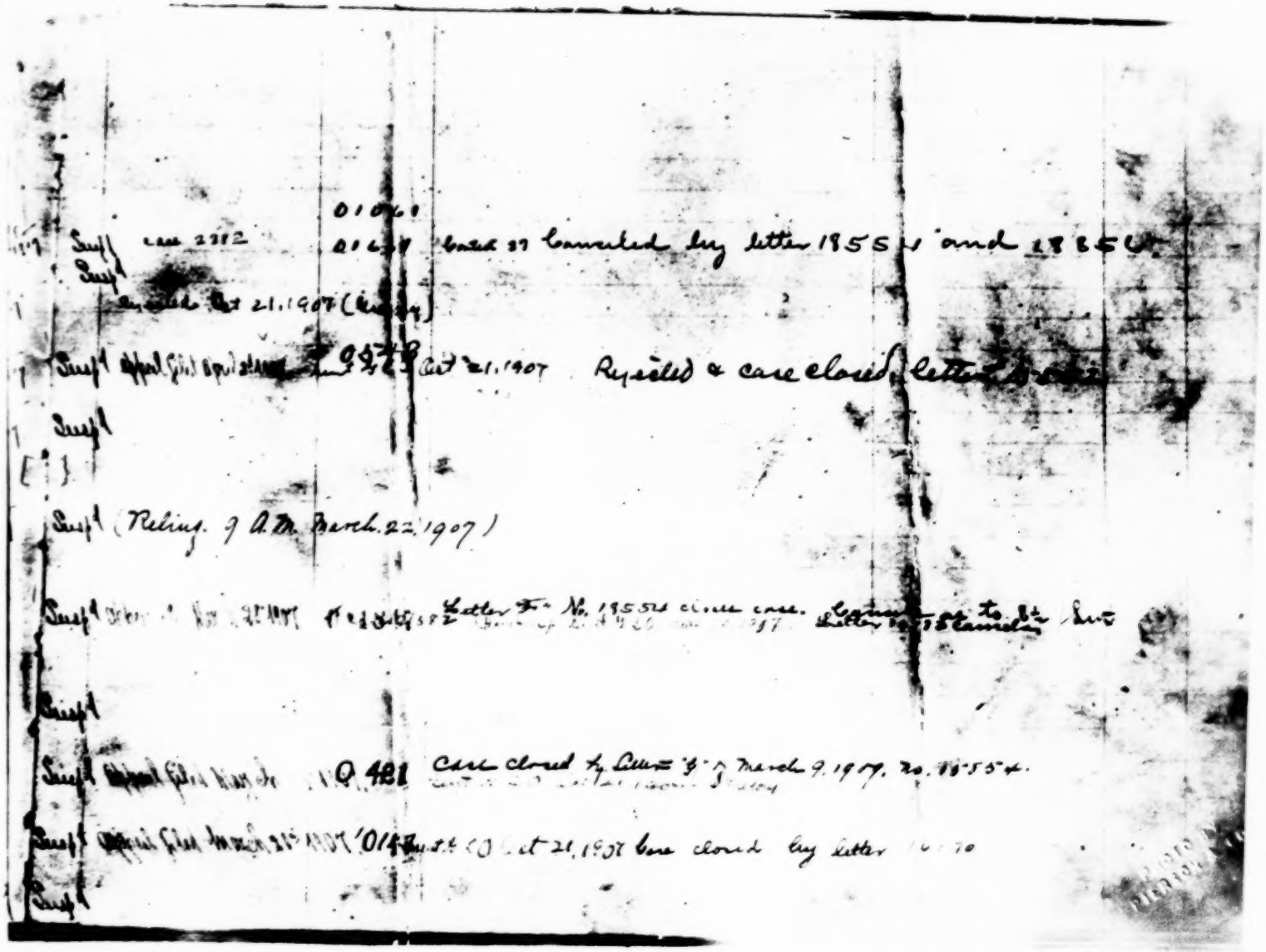
Henry H. Barrett 3/4/07

Thomas Kidder 3/4/07

Charles F. Remington 3/4/07

Bartley Redmond 3/4/07

John Kinnast 3/4/07



POOR COPY

ters and proceedings heretofore occurring in said cause, and not already made a part of the record therein.

I do further certify that the foregoing statement of facts contains all the evidence and testimony introduced upon the trial of said cause, together with all objections and exceptions made and taken to the admission or exclusion of testimony, and all motions, offers to prove and admissions upon the trial of said cause; and that the plaintiff's exhibits "A", "B", "C", "D", "E", "F", "G", "H", "I", "J", "K", "L", and "M" and Defendants' exhibits "1", "2", "3" and "4", as hereto attached are all the exhibits offered upon the trial of said cause.

Counsel for the plaintiffs and counsel for the defendants being present and concurring.

Done in open Court this 14 day of July, 1922.

Ed. E. Hardin, Judge.

(Here follow Plaintiff's Exhibits A and B, marked side folio pages 324, 325, 326, 327, and 328.)

[fol. 329] New Contest Docket

Title of case: Charles W. Reed, Serial 01417; John Carlson, Kingsbury, Cal., Serial 01660; Henry W. Parrott, 6365 S. Lighthouse block, Serial 01661.

Railroad not included because land claimed by it, S. W. ¼, N. W. ¼ has been patented.

Contest No. 37

Suspended Applications, 01417, 01660, 01661

Lot 4 and S. W. ¼, N. W. ¼ and W. ½, S. W. ¼, Sec. 3, T. 39 N., Range 6 E.

Date	Minutes of proceedings
Sept. 29, '09.	This case separated from case 2382 in Docket 9, which see.
Feb. 6, '07.	Charles W. Reed filed homestead application for the described tract.
Feb. 6, '07.	John Carlson filed homestead application for the S. W. ¼ of Sec. 3.
April 27, '07.	Henry W. Parrott filed contest affidavit against entries of Carlson and Reed.
Mar. 8, '07.	Henry W. Parrott filed timber application for the S. W. ¼, Sec. 3.
Oct. 1, '09.	Notices issued citing parties to hearing before register and receiver December 1st, 1909.
Dec. 1, '09.	Reed revokes former authorizations and appoints J. N. Phillips.
Dec. 2, '09.	Receipt 159,015 to Charles W. Reed for the sum of $8.00.

Date	Minutes of proceedings
Dec. 7, '09.	Josiah Thomas files authority to appear for Parrott.
Dec. 18, '09.	Letter "F" No. 16604 calls for report involving this contest. See register's letter of December 27th, 1909 to G. L. O.
Dec. 31, '09.	Testimony filed.
Jan. 22, 1910.	Notice and copy of decision by registered mail to John Carlson, Kingsbury, Cal., and to Josiah Thomas, Seattle.
	Copy of decision by ordinary mail to J. N. Phillips, Bellingham, Wash.
Feb. 18, '10.	Appeal by Parrott filed.
March 9, '10.	Answer to contestant's appeal filed.

[fol. 330]

Mar. 16, '10.	Parrott files affidavit of contest alleging that Reed's tracts are not contiguous.
June 3, '10.	Papers to G. L. O. affidavit of contest last named retained in local office.
Mar. 31, 1911.	Letter "F" calls upon Reed to elect to give up Lot 4 or W. ½, S. W. ¼. Notice May 5th, 1911.
June 12, '11.	Appointment of Hawkins as attorney for Reed filed. All other attorneyships revoked.
June 10, '11.	Appeal by Hawkins for Reed filed.
June 19, '11.	Affidavit of citizenship W. J. Tinchner* corroborating affidavit by Walter M. Smithy filed July 6th, 1911.
July 8, '11.	All papers filed in response to "F" of March 31st, 1911 No. 17575 to G. L. O.
Jan. 3, 1913.	Letter (or affidavit) from Reed revokes authority of E. K. Hawkins.
Jan. 23, '13.	Letter "F" No. 18554 holds in favor of Reed. Notices served, sent up return cards April 11, 1913, and reported no action.
Sept. 17, '13.	Letter "F" No. 18856 closes case.

[fol. 331] Serial Number Register Book No. Two, Serial Numbers 101 to 02000, Inc.

TRACT BOOK RECORD

Hd. Lot 4, S. W. ¼, N. W. ¼, Sec. 3, T. 39 North Range 6 E., W. ½, S. W. ¼

Name of purchaser, Charles W. Reed, 2/6/1907.

Number of receipt, 01417, contest 37.

Lot 1 and S. W. ¼, N. W. ¼, Sec 3, T. 39, North Range 6 East, List No. 43, St. Paul, Minneapolis & M. Railway Company filed May 5th, 1902, Patent No. 29, April 13th, 1908.

*Name should be Tincker. S. D. Pool, Clerk U. S. L. O.

Range 6 East, Twp. 36 to Twp. 41.
Range 7 East, Twp. 11 to Twp. 24. } On back of book No. 10.
Seattle Land Office.

Twp. No. 39, No. Range No. 6 East.

T. L. S. W. ¼, Sec. 3, Twp. 39 North of Range 6 East. Name of purchaser, Henry W. Parrott, 3/8/1907.

Number of Receipt, 01661. Contest 37. Cancelled by letter, 18554 and 18856.

TRACT RECORD

Range 6 East, Tw. 36 to Twp. 41, No. 10, Seattle Land Office, p. 37

Lot 1 and S. W. ¼, N. W. ¼, Sec. 3, Twp. 39 N. Range 6 East, List No. 43, St. Paul, M. & M. Ry. Co. filed May 5th, 1902. See 01417) as to pending suit. Date of patent April 13th, 1908, patent No. 29. Case 2382.

Hd. Lot 4, S. W. ¼, N. W. ¼ & W. ½, S. W. ¼, Sec. 3, Twp. 39 North of Range 6 East. 129.84 acres. Rate per acre, $1.25. Purchase money $10.00. Name of purchaser Charles W. Reed, 2/6/1907. November 21, 1913. Number of receipt 01417. Contest 37. Case 2382.

Pencil memorandum over columns of purchase money, 3/9/09. MacDonald, atty. 403 Sullivan Building, Seattle, Washington. Contest April 27th, 1907, by Henry W. Parrott. Case 2382.

[fol. 332] HOMESTEAD CONTEST DOCKET, UNITED STATES LAND OFFICE, SEATTLE, WASHINGTON

No. 2382

Prior rights, S. W. ¼, N. W. ¼ and S. W. ¼, Sec. 3, T. 39 North Range 6, East. Name of party St. Paul, M. & M. Ry. Co., State of Washington, John Carlson, Charles W. Reed, 01417, Henry W. Parrott, Frank Keidel.

May 5, 1902.—St. P. M. & M. Ry. Co. files list 43 for S. W. ¼, N. W. ¼, Sec. 3, with other lands. List adjustment Feb. 23, 1907.

Feb. 6, 1907.—Plat of survey of township filed.

Feb. 6, 1907.—John Carlson files Hd., app. for S. W. ¼, Sec. 3.

Feb. 6, 1907.—Charles W. Reed files Hd. app S. W. ¼, N. W. ¼, W. ½, S. W. ¼, etc. 01417.

Feb. 6, 1907.—Authority to appear for Reed filed by Comyns.

Feb. 6, 1907.—T. & S. sworn statement filed by Frank Keidel.

Feb. 6, 1907.—Authority to appear for Keidel filed by E. K. Hawkins.

Mar. 8, 1907.—T. & S. app. filed by Henry W. Parrott.

Apr. 6, 1907.—State of Washington files indemnity selections for S. W. ¼, N. W. ¼ & S. W. ¼, Sec. 3, and same was rejected.

June 14, 1907.—State files contest against Carlson and Reed apps.

Oct. 21, 1907.—Hearing ordered and notice issued setting the case for February 18th, 1907 at this office.

Oct. 21, 1907.—Copy of notice sent by Reg. letter to Thomas H. Benton, atty. St. P. M. & M. R. Co., St. Paul, Minn., E. W. Ross, Olympia, John Carlson, Kingsbury, Cal., and Henry W. Parrott, 1330 Humboldt St., Bellingham, Washington, and served personally E. K. Hawkins, atty., Keidel and E. M. Comyns, atty, Reed.

June 24, 1908.—On account of pending appeal the notice of hearing in this case is this day recalled and set aside and notice sent by registered letter to all parties.

Sept. 29, 1909.—See contest No. 37, as to hearing involving the S. W. ¼, N. W. ¼ and W. ½, S. W. ¼. Hearing as to E. ½, S. W. ¼ to be set as soon as suspension of June 24, 1908 is relieved. State not involved as to W. ½, S. W. ¼.

Dec. 18, 1909.—Letter "F" No. 16604, calls for report involving this contest. See register's report dated December 27th, 1909.

Apr. 26, 1912.—Notice of hearing June 12th, 1912, registered to Commissioner Public Lands, Carlson, Hawkins, for Keidel and Josiah Thomas for Parrott.

June 12, 1912.—Hearing held. State appeared by R. E. Campbell Asst. Atty. General, and Parrott appeared by Josiah Thomas. Carlson and Keidel defaulted. Testimony introduced by state.

June 24, 1912.—Decision by R. & R. in favor of state.

June 25, 1912.—Notice of decision registered to Josiah Thomas.

[fol. 333] Copy mailed Commissioner Public Lands

July 16, 1912.—Papers sent to G. L. O.

Jan. 23, 1913.—Letter "F" No. 18554 closes case in favor of State of Washington.

Closed.

[fol. 334] Land Department,

St. Paul, Minneapolis & Manitoba Railway Company

List 43

State of Washington,

U. S. Land Office at Seattle

May 5th, 1902.

The St. Paul, Minneapolis and Manitoba Railway Company, under and by virtue of the Act of Congress entitled "An act for the relief of settlers upon certain lands in the States of North Dakota and South Dakota approved August 5th, 1892, and under and in pursuance of the rules and regulations prescribed by the commissioner of the General Land Office," hereby makes and files the following list of selections of public lands claimed by said company as enuring to it, and to which it is entitled under and by virtue of the grants and provisions of the said act of congress and the location and con-

struction of the line of route of the railway of said company, the selections being particularly described as follows, to-wit: S. W. ¼ of the N. W. ¼, Sec. 3, Township 39, Range 6 East 40 acres.

STATE OF WASHINGTON,
County of King, ss:

I, Thomas R. Benton, being duly sworn, depose and say:

That I am the land agent of the St. Paul, Minneapolis & Manitoba Railway Company; that the foregoing list of lands which I hereby select is a correct list of a portion of the public lands claimed by the said St. Paul, Minneapolis & Manitoba Railway Company as enuring to it under the Act of Congress entitled "An Act for the Relief of Settlers upon certain lands in the States of North Dakota and South Dakota approved August 5th, 1892; that the said lands are vacant, unappropriated and are not interdicted mineral nor reserved lands, and are of the character contemplated by the said act."

Thos. R. Benton.

Sworn to and subscribed before me this first day of April, 1902. G. B. Peavy, a Notary Public in and for the State of Washington, Residing at Seattle. (Notarial Seal.)

U. S. Land Office, Seattle

May 5th, 1902.

We hereby certify that we have carefully and critically examined the foregoing list of Lands claimed by the St. Paul, Minneapolis & Manitoba Railway Company under the grant to the said company by Act of Congress approved August 5th, 1892, entitled "An Act for the Relief of Settlers upon certain Lands in the States of North Dakota and South Dakota, and selected by said the St. Paul, Minneapolis and Manitoba Railway Company by Thomas R. Benton, the [fol. 335] duly authorized agent, and we have tested the accuracy of said list by the plats and records of this office, and that we find the same to be correct; and we further certify that the filing of said list is allowed and approved, and that the whole of said lands are unsurveyed public lands of the United States and that the same are not nor is any part thereof classified and returned as mineral land or lands; nor claimed as swamp lands nor is there any homestead, preemption, state or other valid claim to any portion of said lands on file or of record in this office. We further certify that the foregoing list shows that an assessment of the fees payable to us allowed by the Act of Congress approved July 1st, 1864 and contemplated by the circular of instructions dated November 7th, 1879 addressed by the Commissioner of the General Land Office to registers and receivers of the United States Land Offices and that the said company have paid to the undersigned, the receiver, the

full sum of Ten Dollars in full payment and discharge of said fees.

(Signed) Edward P. Tremper, Register. Columbus T. Tyler, Receiver.

Duplicate

Act of August 5th, 1892

Supplemental List No. 43

7/21/1902.

S. W. ¼ of N. W. ¼, Sec. 3, Twp. 39 North, Range 6 East, 40 Acres.

This list is a rearrangement of List 43 and is filed for the purpose of rearranging the lost or relinquished lands designated therein to conform to departmental regulations.

(Signed) Thomas R. Benton, Selecting Agent St. P., M. & M. Ry. Co.

List No. 43—A, Supplemental to List No. 43

State of Washington,

U. S. Land Office at Seattle

Feb. 18, 1907.

The St. Paul, Minneapolis & Manitoba Railway Company under and by virtue of the Act of Congress, entitled "An Act for the relief of Settlers upon certain lands in the States of North Dakota and South Dakota" approved August 5th, 1892, and under and in pursuance of the rules and regulations prescribed by the Commissioner of the General Land Office, hereby makes and files the following list of selections of public lands claimed by said company as enuring to it, and to which it is entitled under and by virtue of the grants and provisions of the said Act of Congress and the location and construction of the line of route of the railway of said company, the selections being particularly described as follows, to-wit:

[fol. 336] S. W. ¼ of the N. W. ¼, Sec. 3, Twp. 39 North Range 6, East of Willamette Principal Meridian—40 Acres.

This selection is supplemental to a selection of the same lands made May 5th, 1902 (list No. 43) and is made and filed for the purpose of adjusting the selection of 1902 to the lines of the public surveys.

Thos. R. Benton, Selecting Agent.

STATE OF MINNESOTA,
County of Ramsey, ss:

I, Thomas R. Benton, being duly sworn depose and say: that I am the land agent of the St. Paul, Minneapolis & Manitoba Railway

Company; that the foregoing list of lands which I hereby select is a correct list of a portion of the public lands claimed by the said The St. Paul, Minneapolis & Manitoba Railway Company as enuring to it under the act of Congress entitled "An act for the Relief of Settlers upon certain lands in the States of North Dakota and South Dakota, approved August 5th, 1892; that the said lands are vacant, unappropriated and are not interdicted mineral nor reserved lands, and are the character contemplated by the said act.

Thos. R. Benton.

Sworn to and subscribed before me this 18th day of February, 1907.

James Stoddard, Notary Public, Ramsey County, Minnesota.

My commission expires June 21st, 1911. (Notarial Seal.)

U. S. Land Office

Seattle, Washington, Feb. 23, 1907.

We hereby certify that we have carefully and critically examined the foregoing list of lands claimed by the St. Paul, Minneapolis & Manitoba Railway Company under the grant to the said company by Act of Congress approved August 5th, 1892, entitled "An Act for the Relief of settlers upon certain lands in the States of North Dakota and South Dakota and selected by said The St. Paul, Minneapolis & Manitoba Railway Company by Thomas R. Benton, the duly authorized agent; and we have tested the accuracy of said list by the plats and records of this office, and that we find the same to be correct; and we further certify that the filing of said list is allowed and approved, and that the whole of said lands are surveyed public lands of the United States, and that the same are not nor is any part thereof classified and returned as mineral land or lands nor claimed as swamp lands nor is there any prior homestead, preemption and state or other valid claim to any portion of said lands on file or of record in this office.

We further certify that the foregoing list shows that an assessment of the fees payable to us allowed by the act of congress approved July 1st, 1864, and contemplated by the circular of instructions dated November 7th, 1879 addressed by the Commissioner of the General Land Office to registers and receivers of the United States [fol. 337] land offices, and that the said company have paid to the undersigned, the receiver, the full sum of (fees paid May 5th, 1902, list No. 43) dollars in full payment and discharge of said fees.

J. Henry Smith, Register. Frank A. Twitchell, Receiver.

[fol. 338] Letter 18554

In reply please refer to Seattle 01417, 01660, Seattle 01661, 01847.

"F," J. S. J. 1 x R. & R.

2 L. 3 X.

Department of the Interior,

General Land Office, Washington

January 23rd, 1913.

Charles W. Reed vs. John Carlson, Henry W. Parrott, and St. Paul, M. & M. Railway Company. Allowing Homestead Application 01417, for Lot 4, and W. ½, S. W. ¼, Sec. 3, Twp. 39, North Range 6 East

Register and Receiver, Seattle, Washington.

SIR: On February 6, 1907, Charles W. Reed filed in your office application No. 01417 to make homestead entry for Lot 4, S. W. ¼, N. W. ¼ and W. ½ of S. W. ¼, Sec. 3, Twp. 39 N. R. 6 E., alleging settlement on November 24th, 1906.

On the same date, February 6th, 1907, John Carlson filed application No. 01660 to make homestead entry for the S. W. ¼, Sec. 3, T. 39 N. R. 6 East, and on March 8th, 1907, Henry W. Parrott filed application 01661 to make timber and stone entry for the last described tract.

It also appears that on February 6th, 1907, Frank Keidel filed application 01847, to make timber and stone entry for Lot 3, S. E. ¼ N. W. ¼, and E. ½, S. W. ¼, Sec. 3, T. 39 North Range 6 East. On April 6th, 1907 The State of Washington filed indemnity school land selection No. 29 for Lot 3, Section 3, T. 39 North of Range 6 East, and on the same date the state filed indemnity school selection No. 32 for the S. E. ¼, N. W. ¼ and E. ½ of S. W. ¼, Sec. 3, T. 39 North of Range 6 East.

On May 5th, 1902, the St. Paul, Minneapolis & Manitoba now Great Northern Railway Company, filed in your office application to select with other lands, the S. W. ¼, N. W. ¼, Sec. 3, T. 39 North of Range 6, East, under Act of August 5th, 1892 (27 Stat. 360). The plat of survey for this land was filed in your office February 6th, 1907, and on February 23rd, 1907, the company filed application conforming its said selection to the survey. On April 13th, 1908, patent No. 29 was issued to the company for said tract.

From the foregoing it will appear that all of the lands hereinbefore described are involved in this contest, to-wit: Lots 3, 4, S. ½ N. W. ¼ and S. W. ¼, Sec. 3, T. 39 North Range 6 East, and each conflicting claim will be considered herein.

On December 1st, 1909, a hearing was held before your office in accordance with the rules of practice to determine the respective rights of Charles W. Reed, John Carlson and Henry W. Parrott as to

the W. ½, S. W. ¼ said Sec., Twp. and Range. It appears that on January 10th, 1911, you held the application 01417 of Charles W. Reed for allowance as to the said W. ½, S. W. ¼ and rejected the application of John Carlson and Henry W. Parrott. From your decision appeals were filed by both Parrott and Carlson.

On February 9th, 1910, Charles W. Reed filed in your office a pro- [fol. 339] test which you forwarded to this office, praying that a hearing be had as to the S. W. ¼, N. W. ¼ covered by his homestead application, and requesting that the patent to the St. Paul, Minneapolis & Manitoba Railway Company be cancelled as to said tract. As the selection of the railway company was filed nearly four years prior to the settlement of Charlees W. Reed by decision "F" of March 31st, 1911, this office held that his application must be rejected as to the S. W. ¼, N. W. ¼, Sec. 3, T. 39 North Range 6 East, and also ruled;

This will cause his homestead claim to be divided into two non-contiguous tracts, one of eighty acres and one of forty acres; therefore it will be necessary for him to file his election as to which tract he desires to hold.

Your office was directed to notify Reed of his option of election or appeal to the Secretary of the Interior.

On October 3rd, 1912, the case being before the Department on Appeal by Charles W. Reed, the first assistant secretary of the Interior rendered a decision in the matter and modified decision "F" of March 31st, 1911, and directed that under the circumstances Reed should be allowed in the absence of any adverse claim to perfect his entry for Lot 4, and the W. ½, S. W. ¼, Sec. 3, Tp. 39 North of Range 6 East, and remanded all the papers in the case to this office for further consideration and action in accordance with said ruling.

It will be observed from the foregoing that there is no conflict between the State of Washington and Charles W. Reed as to any of the lands covered by his homestead application. There is a conflict however, between Reed, John Carlson and H. W. Parrott as to the W. ½, S. W. ¼ Sec. 3, Twp. 39 North of Range 6 East.

The record in this case establishes the entire good faith of Charles W. Reed as to his settlement upon Lot 4, and the W. ½, S. W. ¼, Sec. 3 Twp. 39 North Range 6 East, but in view of the prior claim of the St. Paul, Minneapolis & Manitoba Railway Company, as to the S. W. ¼, N. W. ¼, his homestead application 01417 must be rejected to that extent.

Your decision rejecting homestead application 01660 by John W. Carlson for the W. ½, S. W. ¼, said Sec. 3, and homestead application 01661 by Henry W. Parrott for said tract is hereby affirmed, subject to the usual right of appeal to the Secretary of the Interior within thirty days after notice. You will notify Carlson and Parrott hereof, and in due time submit a proper report with evidence as to service of notice as to all action taken by them in the premises.

On July 26th, 1912, you transmitted to this office the record of the hearing had in the case of the State of Washington against John Carlson, Frank Keidel and Henry W. Parrott, involving the E. ½, S. W. ¼, Sec. 3, Twp. 39 North Range 6 East. After due notice to

all the parties in interest, a hearing was had before your office June 12th, 1912, to determine the superiority of the conflicting claims of the State of Washington, John Carlson, Frank Keidel and Henry W. Parrott to the E. ½ S. W. ¼, Sec. 3, T. 39, North of Range 6 East. The State of Washington was represented by attorney, and Henry W. Parrott was present and represented by his attorney. Neither John Carlson or Frank Keidel appeared at the hearing. You rendered a decision and held that in view of the default of Carlson and Keidel, their application should be rejected and recommended that the application of the State of Washington be allowed, and that the applications in the claims of Carlson and Keidel and Parrott be rejected.

After due notice no action was taken by John Carlson, Frank Keidel or Henry W. Parrott; therefore I concur in your conclusions and affirm your decision rejecting their claims as to the E. ½ of the [fol. 340] S. W. ¼ Sec. 3, Twp. 29, North Range 6 East. Accordingly homestead application 01660 by John Carlson and homestead application 01661 by Henry W. Parrott are hereby finally rejected as to the E½, S. W. ¼, Sec. 3, Twp. 39 North Range 6 East.

Indemnity School Selection No. 29 for Lot 3 and Indemnity School Selection No. 32 for the S. E. ¼, N. W. ¼ and E. ½, S.W. ¼, Sec. 3, T. 39 North Range 3 East will be subject to future considerations by this office. You will assign current serial to each of the indemnity selections Nos. 29 & 32, and report the same to this office in a separate letter without delay, noting your schedule with reference to this letter by date and initial.

A copy of departmental decision under date of October 3rd, 1912 hereinbefore referred to is herewith enclosed for the files of your office. You will advise Charles W. Reed of this action. You will also notify Thomas R. Benton, St. Paul, Minnesota, attorney for the Great Northern Railway Company and the proper representatives of the State of Washington, hereof.

Very respectfully, Fred Dennett, Commissioner. Board of Law Review, by W. B. Pugh.

No. 18856

In reply please refer to "F," Seattle, 01417, J. S. J.
3 X.
J. S. J. 1 x R. & R. 2 Incs.

Department of the Interior,

General Land Office

Washington

September 17, 1913.

Charles W. Reed vs. John Carlson and Henry W. Parrott. Homestead Application 01660 and Timber and Stone Application 01661 Rejected and Cases Closed in Favor of Charles W. Reed

Register and Receiver, Seattle, Washington,

Sirs: On February 6th, 1907 Charles W. Reed filed in your office application 01417 to make homestead entry of Lot 4, S. W. ¼, N. W. ¼, and W. ½ S. W. ¼, Sec. 3, T. 39, North Range 6, East, alleging settlement on November 24, 1906. The plat of survey for this land was filed in your office February 6th, 1907.

[fol. 341] On the same date, February 6th, 1907, John Carlson filed application 01660 to make homestead entry of the S. W. ¼ of Sec. 3, T. 39, North Range 6 East; and on March 8th, 1907, Henry W. Parrott filed application 01661 to make timber and stone entry of the last described tract.

By decision "F" of January 23rd, 1913, homestead application 01660 by John Carlson, and timber and stone application 01661 by Henry W. Parrott were finally rejected as to the E. ½, S. W. ¼, Sec. 3, T. 39, North of Range 16 East; and both of said applications were held for rejection as to the W. ½, S. W. ¼ of Sec. 3, T. 39, North of Range 6 East, for a conflict with the homestead application (01417) and settlement claim of Charles W. Reed subject to the usual right of appeal.

I am now in receipt of your report under date of April 11th, 1913, transmitting evidence as to service of notice under said decision "F" of January 23rd, 1913, consisting of a registry return receipt signed "John Carlson per Mrs. John Carlson" dated February 25th, 1913; also registry return receipt signed "Josiah Thomas," attorney for Henry W. Parrott by "Grata Dolson" dated February 11th, 1913, and you report no action taken in the premises by Carlson or Parrott.

Accordingly homestead application 01660 by John Carlson and timber and stone application 01661 by Henry W. Parrott for the said W. ½, S. W. ¼, Sec. 3, T. 39, North of Range 6, East, will stand rejected. You will so note on the records of your office, referring to this letter by date and initials.

The records show that on May 5th, 1902, the St. Paul, Minneapolis & Manitoba (now Great Northern) Railway Company filed in your office list of selections No. 43, to select the S. W. ¼, N. W. ¼ of

Sec. 3, T. 39, North of Range 6 East (Supplemental list No. 43-A), filed February 23, 1907, and that patent issued to the company therefor on April 23, 1908.

It appears that on January 10th, 1911, the application (01417) of Charles W. Reed was held for allowance by you as to W. ½, S. W. ¼, and for rejection as to Lot 4, and S. W. ¼, S. W. ¼, Sec. 3, T. 39, North of Range 6 East. Said application was held for rejection by you as to the S. W. ¼, of N. W. ¼ because this tract had been patented to the St. Paul., Minneapolis & Manitoba (Now Great Northern) Railway Company, and as to lot 4, because it was non-contiguous to the W. ½, S. W. ¼, Sec. 3, T. 39, North of Range 6 East.

On October 3, 1912, the case being before the Department, on appeal by Reed from office decision "F" of March 31, 1911, the first Assistant Secretary of the Interior rendered a decision in the matter and modified said decision "F" of March 31, 1911, and directed that, under the circumstances, Reed should be allowed, in the absence of any adverse claim, to perfect his entry for Lot 4, and the W. ½, S. W. ¼, Sec. 3, T. 39, North Range 6 East, and remanded all the papers in the case to this office for further consideration, and action, in accordance with said ruling.

Accordingly the homestead application of Charles W. Reed is hereby rejected as to the S. W. ¼, N. W. ¼, Sec. 3, T. 39, North Range 6, East. Said application is herewith returned, which you will allow after eliminating said S. W. ¼, N. W. ¼ upon the payment of all fees and commission, if not already paid by Charles W. Reed.

You will notify Reed hereof and allow him thirty days within which to complete his filing. Thereafter you will transmit said homestead papers to this office with your regular monthly returns. The claim of Reed will remain intact, subject to full compliance with [fol. 342] the law under which the same was initiated.

You will notify Thomas R. Benton, St. Paul, Minnesota, attorney for the Great Northern Railway Company, hereof.

I enclose herewith a copy of Departmental Decision of October 3, 1912, in this case for the files of your office.

Very respectfully, Clay Tallman, Commissioner. Board of Law Review, by W. P. Pugh.

[fol. 343] We, G. A. C. Rochester, Register of the United States Land Office at Seattle, Washington, and Jacob W. Oyen, Receiver of the United States Land Office at Seattle, Washington, hereby certify the foregoing attached, typewritten pages be and contain a true and complete transcript of the entries relating to lot 4, the S. W. ¼ of the N. W. ¼, and the W. ½ of the S. W. ¼ of Section 3, Township 39, North of Range 6, East of the Willamette Meridian, as the same appears on Tract Book Record, Serial Numbers 1002 to 02000, inclusive; tract record supplement, each being records kept in said United States Land Office, and of the following, to-wit:

List Number 43 of the St. Paul, Minneapolis & Manitoba Railway Company, dated May 5th, 1902, relating to the S. W. ¼ of the

N. W. ¼ of said Section 3, Township 39, North of Range 6 East, the certificate thereto of Edward P. Tremper, Register, and Columbus T. Tyler, receiver of the United States Land Office at Seattle, Washington.

Duplicate Supplemental List No. 43 dated July 21st, 1902, made by Thomas R. Benton, selecting agent St. Paul, Minneapolis & M. Railway Company.

List No. 43-A, supplemental to List Number 43 of the St. Paul, Minneapolis & M. Railway Company, dated February 18th, 1907, and certificate thereto in the United States Land Office, Seattle, Washington, under date of February 23rd, 1907, by J. Henry Smith, Register, and Frank A. Twitchell, Receiver.

Homestead Contest Docket United States Land Office, Seattle, Washington, case 2382.

New Contest Docket United States Land Office, Seattle, title of case: Charles W. Reed, serial 01417. John Carlson, Kingsbury, Cal., Serial 01660. Henry W. Parrott, 6365 Lighthouse Block, Serial 01661. Railroad not included because land claimed by it, S. W. ¼ of N. W. ¼ has been patented, being contest Number 37.

Letter 18554 Seattle 01417, 01660 "F," J. S. J., Seattle, 01661, 01847, being letter bearing date January 23rd, 1913, addressed to the Register and Receiver at Seattle, Washington, and signed by Fred Dennett, Commissioner.

Letter Number 18856 "F," Seattle, 01417, J. S. J., dated September 17, 1913, addressed to Register and Receiver, Seattle, Washington, and signed by Clay Tallman, Commissioner.

We further certify that the foregoing attached photographs are true, complete and correct photographic copy of so much of the record appearing in said Tract Book Records as show the entries and notations therein found, pertaining to lot 4, the S. W. ¼ of the N. W. ¼ and the W. ½ of the S. W. ¼ of Section 3, Township 39, North of Range 6, East of the Willamette Meridian, all of which transcript of said record, lists, letters, docket record entries and photographs have been compared with the original records thereof now kept in the United States Land Office at Seattle, and found to be a true and complete transcript of said records and files.

Dated at the United States Land Office, Seattle, Washington, this 15th day of February, 1916.

G. A. C. Rochester, Register. Jacob W. Oyen, Register and Receiver U. S. Land Office, Seattle, Washington.

[fol. 344] [File endorsement omitted.]

[fol. 345] [File endorsement omitted]

PLAINTIFFS' EXHIBIT C—Filed June 24, 1920

"F." Seattle 01417

CHARLES W. REED v. ST. PAUL, MINNEAPOLIS AND MANITOBA RAILWAY COMPANY

Suit to Vacate Patent Denied

Petition for the Institution of a Suit to Vacate Patent

April 18, 1916.

Charles W. Reed has filed a petition requesting the Department to procure institution of a suit to vacate the patent issued April 13, 1908, to the St. Paul, Minneapolis and Manitoba Railway Company, for the S. W. ¼, N. W. ¼, Sec. 3, T. 39 N., R. 6 E., W. M., Seattle, Washington, land district. A similar request was denied by departmental decisions of January 16, 1914, and April 22, 1914.

The above land was selected May 5, 1902 (while still unsurveyed, by the railway company, under the act of August 5, 1892 (27 Stat., 390). Upon February 6, 1907, Reed filed his homestead application for this tract, together with certain other adjoining subdivisions, asserting that he had settled thereon November 24, 1906. The present petition asserts that the register and receiver failed to transmit his homestead application to the General Land Office until April 30, 1908, and that the issuance of patent while his application was pending was erroneous.

Reed's allegations of settlement at the time of presenting his application placed the time thereof as subsequent to the filing of the railway company's selection. At the time of the issuance of patent therefor, in so far as the facts were disclosed by Reed, such issuance was correct. Upon June 19, 1911, however, Reed filed affidavits to the effect that one Tincker had settled upon the land in 1901, prior to the railway company's selection. This showing, however, was not made until after the patent had issued to the railway company.

In its decision of January 16, 1914, the Department stated as follows:

> I am of the opinion that there was no such error in the issuance of patent to the Railway Company as would justify this Department in requesting the Attorney General to institute suit for the cancellation of the patent. Had Reed presented all the facts with reference to his settlement claim at the date of the tender of his homestead application, undoubtedly patent could not properly have issued to the Railway Company without affording him an opportunity to be heard. He is now before the Department asking its intervention against the consequences of his own laches.

If, under the facts alleged in the pending petition, Reed has a

superior right to the land under consideration, his remedy would [fol. 346] appear to lie in an action in the courts against the Railway Company.

Nothing is presented in the present petition which would warrant any change in the views above quoted. It may further be pointed out that the petition does not disclose the status of the present title to the land, and also that any suit to set aside the patent is now apparently barred by section 8 of the act of March 3, 1891 (26 Stat., 1903).

The petition is accordingly hereby denied.

(Signed) Andrieus A. Jones, First Assistant Secretary.

[fol. 347] [File endorsement ommitted]

PLAINTIFF EXHIBIT D—Filed June 24, 1920

Department of the Interior

United States Land Office

Seattle, Washington

Contest 37

CHARLES W. REED (Seattle Serial 01417), JOHN CARLSON (Seattle Serial 01660), HENRY W. PARROTT (Seattle Serial 01661)

Involving W. ½ S. W. ¼ Sec. 3, T. 39 N., R. 6 E., W. M.

Decision

The plat of the survey of fractional township 39 North, range 6 east, W. M., embracing the lands above described, was filed in this office on the 6th day of February, 1907, at the hour of nine o'clock a. m.

At the time of the filing of said plat, to-wit: February 6, 1907, at nine o'clock a. m., Charles W. Reed filed a homestead application for the S. W. ¼ N. W. ¼, Lot 4 (N. W. ¼ N. W. ¼), and W. ½ S. W. ¼, Sec. 3 T. 39 N., R. 6 E., W. M., and at the same time John Carlson filed a homestead application for the S. W. ¼ of said section 3.

On April 27, 1907, Henry W. Parrott filed what purported to be an affidavit of contest against the said homestead application of Charles W. Reed, wherein he alleged, among other things as follows:

"that said land embraced in said entry and particularly that portion thereof embraced within the S. W. ¼ of section three Township 39 North Range Six East, W. M., is unfit for cultivation, that

the soil thereon is of a rocky nature and cannot be made fit for cultivation to any appreciable extent; that it can never be made more valuable for agricultural purposes than it is for its timber and stone; that said described land is situated upon a mountain side and is steep and rocky, rough and broken and difficult of access; that said land is heavily timbered and is chiefly valuable for its timber."

On April 27, 1907, the said Henry W. Parrott filed what purported to be an affidavit of contest against the said homestead application of John Carlson, wherein he alleged, among other things, as follows:

[fol. 348] "that said land embraced and described in said entry is unfit for cultivation; that the soil thereon is of a rocky nature and cannot be made fit for cultivation to any appreciable extent; that the said described land is situated upon a steep mountain side, and is rough and difficult of access, that said land is heavily timbered and is chiefly valuable for its timber;"

On March 8, 1907, the said Henry W. Parrott filed a timber land application for said southwest quarter of section three of said township and range, which said timber land application was by this office suspended awaiting the final disposition of said homestead applications of Reed and Carlson.

On April 6, 1907 the State of Washington filed an indemnity lieu selection for said southwest quarter of section three, which was withdrawn prior to the ordering of this hearing.

On October 1, 1909, a hearing was, by this office, ordered to be had on the first day of December, 1909, at the hour of 10 o'clock a. m., for the purpose of determining the relative rights of all of the said parties above named as to the west half of the southwest quarter of said section three, notice of which said hearing was duly issued and served on all of the parties above named or their attorneys of record.

At the time set for said hearing, to-wit: December 1, 1909, at 10 o'clock a. m., said case was called for hearing, the homestead applicant Charles W. Reed appeared in person and by his attorney, J. N. Phillips, the homestead applicant John Carlson not in anywise appearing, the said contestant and timber land applicant not appearing in person but being represented by his attorney, Josiah Thomas, and by order of this office the case was adjourned until the hour of two o'clock p. m. of said day for the purpose of further awaiting the appearince of said Carlson; at which time said Reed and Parrott again appeared as before, and the said Carlson still failing in anywise to appear, and it appearing to the office that said Carlson had been duly and regularly served with notice of said hearing by registered mail, on motion of counsel for said Reed a default was entered against the said Carlson. Counsel for said Reed [fol. 349] thereupon moved a dismissal of the claim of said Henry W. Parrott "on the ground that he has not made a sufficient showing in his affidavit of application to attack this homestead" (appli-

cation of Reed). Thereupon counsel for said Parrott moved for a continuance supported by his own affidavit filed therewith. Thereupon the motion of counsel for Reed to dismiss as to Parrott, being treated as a general demurrer to the sufficiency of the allegations contained in said affidavit of contest, was sustained, and the showing made in support of the application of said Parrott for continuance being deemed insufficient; the same was denied; whereupon, at the request of counsel for said homestead applicant Reed, he was permitted to introduce evidence of sundry witnesses, who were sworn and examined on his behalf in support of his said homestead application; from which said evidence it appears that said homestead applicant Reed settled on the land embraced in his said homestead application on or about the 24th day of November, 1906, and has continued to reside thereon, improve, and cultivate the same ever since said date, by reason of which said showing and by reason of the default of said Carlson, and further by reason of the insufficiency of the charges contained in said affidavit of contest on the part of said Parrott, it is hereby ordered:

First: That the said contest of Henry W. Parrott should be, and the same is, hereby dismissed.

Second. That the said timberland application of said Henry W. Parrott should be, and the same is, hereby rejected as to the west half of the southwest quarter of said section three in said township and range.

Third. That the homestead application of the said John Carlson should be, and the same is, hereby rejected as to the west half of the southwest quarter of said section three in said township and range.

Fourth. That the homestead application of the said Charles W. Reed should be, and the same is, hereby allowed as to the west half of the southwest quarter of said section three in said township and range.

Dated at Seattle, Washington, January 21, 1910.

J. Henry Smith, Register. F. A. Twitchell, Receiver.

Dict. J. H. S. A. R.

[fol. 350] [File endorsement omitted.]

PLAINTIFFS' EXHIBIT E—Filed June 24, 1920

17575

Department of the Interior,

General Land Office

Washington, March 31, 1911.

Calling for Election

Register and Receiver, Seattle, Wash.

SIRS: On May 5, 1902, the St. Paul, Minneapolis & Manitoba Railway Company filed in your office an application to select, with other lands, the S. W. ¼ N. W. ¼ Sec. 3 T. 39 N., R. 6 E. W. M., under the act of August 5, 1892 (27 Stat. 390). Plat of survey was filed in local office on February 6, 1907, and on February 23, 1907, the Company filed application conforming its said list thereto. On April 13, 1908, patent No. 29 was issued for said tract to the Great Northern Railway Company, successor in interest of the St. Paul, Minneapolis & Manitoba Railway Company.

On February 6, 1907, Charles W. Reed filed in your office, Homestead Application 01417, for Lot 4, S. W. ¼ N. W. ¼ and W. ½ S. W. ¼, Sec. 3. T. 39 N., R. 6 E. W. M., alleging settlement on November 24, 1906; on the same date (February 6, 1907) John Carlson filed Homestead Application 01660 for the S. W. ¼ said Section, township and range, and on April 27, 1907, Harry W. Parrott filed timber & stone application for the last described tract.

On December 1, 1909 a hearing was held before your office, in accordance with the rules of practice, to determine the respective rights of Charles W. Reed, John Carlson, and Henry W. Parrott, as to the W. ½ S. W. ¼ said Section 3, and on January 21, 1910, you allowed the application of Charles W. Reed as to the said W. ½ S. W. [fol. 351] ¼, rejecting the Timber & Stone application of Henry W. Parrott and the Homestead Application of John Carlson. From your decision appeals were filed by H. W. Parrott and John Carlson, respectively.

On February 9, 1910, Charles W. Reed filed in your office, a protest which you forwarded to this office, praying for a rehearing as to the S. W. ¼ N. W. ¼ of Section 3, and requesting that the patent to the Great Northern Railway Company be cancelled as to the S. W. ¼ N. W. ¼, said Section, Township and Range.

As the selection of the Railway Company was filed nearly four years prior to the settlement of the Homestead applicant, Charles W. Reed, his application must be rejected as to the S. W. ¼ N. W. ¼, Section 3, T. 39 N., R. 6 E. This will cause his Homestead claim to be divided into two non-contiguous tracts, one of eighty

acres, and the other of forty; therefore it will be necessary for him to file his election as to which tract he desires to hold.

You will notify him of his option of election and allow him thirty days after notice within which to file the same. In due time, you will submit a proper report to this office as to the action taken in the premises.

Very respectfully, L. V. Proudfoot, Assistant Commissioner.

[fol. 352] [File endorsement omitted]

PLAINTIFFS' EXHIBIT F—Filed June 24, 1920

D-16674

Department of the Interior,

Washington

Oct. 3, 1912.

"F." Seattle 01417

CHARLES W. REED

v.

ST. PAUL, MINNEAPOLIS AND MANITOBA RAILWAY COMPANY

Election Required Reversed. Noncontiguity Allowed

Appeal from the General Land Office

Charles W. Reed appealed from the decision of the Commissioner of the General Land Office of March 31, 1911, requiring him to elect as to which of two noncontiguous tracts he would take as his homestead entry, Lot 4, or W. ½ S. W. ¼, Sec. 3 T. 39 N., R. 6 E., W. M., Seattle, Washington.

May 5, 1902 the Railway Company filed at the Local Office application to select, with other lands, the S. W. ¼, N. W. ¼ Sec. 3. T. 39 N. R. 6 E. W. M., under act of August 5, 1892 (27 Stat. 390). Plat of survey was filed in the Local Office February 6, 1907. On the same day Reed filed in the Local Office his homestead application for Lot 4, S. W. ¼, N. W. ¼ and W. ½, S. W. ¼, Sec. 3, alleging settlement November 24, 1906. February 23, 1907, the company applied to conform said selection to the lines of survey. April 23, 1908, patent was issued to the Great Northern Railway Company, successor in interest to the selecting company, for S. W. ¼, N. W. ¼, thus breaking into two noncontiguous tracts of forty and eighty acres, respectively, the contiguous tract which Reed claimed under his settlement and for which he applied to make entry. At the same time as Reed's application for entry John Carlson applied for the S. W. ¼ of the section, and Henry W. Parrott made timber and

stone application for the same tract. A hearing was ordered and held [fol. 353] at the Local Office December 1, 1909, to determine the rights as between themselves of Reed, Carlson and Parrott as to W. ½, S. W. ¼. January 21, 1910, the Local Office allowed Reed's application as to W. ½, S. W. ¼ rejecting the applications of the two adverse claimants.

February 9, 1910, Reed filed in the Local Office a protest, asking for a rehearing between himself and the Railway Company as to the S. W. ¼, N. W. ¼ Sec. 3, and that the patent to the Railway Company be cancelled.

The Commissioner held that, as the railway selection was filed nearly four years prior to Reed's settlement, his application must be rejected, and thereupon ruled him to elect which of the remaining noncontiguous parts of his settlement claim he would enter.

It was error of the general land office to issue patent to the railroad company while an undisposed of settlement claim was existing against it. There should have been a hearing between the railway company and the selector, as to the priority of right. Affidavits filed by Reed show that the land in question was settled upon by one J. W. Tincker during 1901, he being a qualified settler entitled to take a homestead entry and intending so to do. He remained in possession until August, 1906, when he sold his settlement claim to Walter M. Smithey, who intended to make a homestead entry of it, but, November 24, 1906 sold it to Charles W. Reed for a valuable consideration, who then took possession and has been in possession ever since.

If these allegations are true, then the land was not subject to the railroad selection of May 5, 1902, having been previously settled upon and claimed by Tincker, a qualified settler under the homestead law; for, by the act of 1892 according to the company a right of selection, such right is limited to—

* * * "an equal quantity of non-mineral public lands, so classified as non mineral at the time of actual government survey, [fol. 354] which has been or shall be made, of the United States, not reserved, and to which no adverse right or claim shall have attached or have been initiated at the time of the making of such selection lying within any state, into or through which the railway owned by said railway company runs, to the extent of the lands so relinquished and released."

Both at the time of the filing of the original selection for unsurveyed lands and at the time of its adjustment to the lines of the survey, the tract in question was embraced within the claim of an actual bona fide settler. A hearing should, therefore, have been ordered between Reed, the homestead applicant, and the railway company. Patent having issued, however, to the railway company, the tract has passed beyond the jurisdiction of this Department, Reed should not suffer for such error of the Land Department and if he is willing to accept the remainder of the tracts embraced in his claim he should be allowed to perfect title thereto, notwithstanding such

tracts are rendered noncontiguous by reason of the erroneous issue of patent to 40 acres of the land to the railway company. De Simas v. Periera (29 L. D., 721). Unless, therefore, it is found desirable to further investigate the allegations respecting settlement, made in support of Reed's application, the same will be allowed, and, if perfected, in the absence of other objections, may be submitted to the Board of Equitable Adjudication for confirmation.

The decision appealed from must be, and is, accordingly hereby reversed and the case remanded for further consideration and action in accordance with this opinion.

Samuel Graves, First Assistant Secretary.

[fol. 355] [File endorsement omitted]

PLAINTIFFS' EXHIBIT G—Filed June 24, 1920

D-16674

Department of the Interior,

Washington

Jan. 16, 1914.

"F." Seattle 01417

CHARLES W. REED

v.

ST. PAUL, MINNEAPOLIS & MANITOBA RAILWAY COMPANY

The Commissioner of the General Land Office.

SIR: On December 6, 1913, you transmitted the petition of Charles W. Reed, filed in the local office on November 21, 1913, that the Department recommend suit for the cancellation of the patent issued on April 13, 1908, under the act of August 5, 1892 (27 Stat. 390), to the St. Paul, Minneapolis & Manitoba Railway Company, for S. W. ¼, N. W. ¼ Sec. 3 T. 39 N. R. 6 E., W. M. Seattle Washington Land District.

It is alleged in the petition that in October, 1901, one Tincker settled on said land and that he lived thereon until October 1906, when he sold his settlement right to one Smithey, who resided upon the tract until November 24, 1906, when he transferred his settlement right to Reed. It appears from the record that on May 5, 1902, the railway company filed in the local office its application to select this tract under said Act of August 5, 1892. The township plat of survey was filed in the local office on February 6, 1907, at which time Reed filed his homestead application for said land and three forty acre subdivisions contiguous thereto, alleging settlement on November 24, 1906. On February 23, 1907, the railway com-
[fol. 356] pany conformed its selection to the lines of survey, and on April 13, 1908, as before stated, patent was issued to it.

One phase of this controversy was before the department in the case of Reed v. St. Paul, Minneapolis & Manitoba Railway Company (41 L. D., 375). In its decision in that case the Department intimated that your predecessor erred in not ordering a hearing between Reed and the railway company prior to the issuance of patent. This conclusion appears to have been predicated upon a finding that at the date of the issuance of patent the facts relative to the settlement of Tincker and Smithey, and Reed's successorship thereto, were before your bureau. As a matter of fact it appears that at the date of the patent to the railway company, Reed was asserting only his own settlement in 1906, more than four years subsequent to the filing of the State's selection. Under such circumstances it is obvious (no)
that upon the facts then presented to the General Land Office a hearing was necessary to determine the question of priority of right. Conceding the truth of Reed's claim of settlement as then presented patent must have issued to the Railway Company at it did.

I am of the opinion that there was no such error in the issuance of patent to the Railway Company as would justify this Department requesting the Attorney General to institute suit for the cancellation of the patent. Had Reed presented all the facts with reference to his settlement claim at the date of the tender of his homestead application, undoubtedly patent could not properly have issued to the Railway Company without affording him an opportunity to be heard. He is now before the Department asking its intervention against the consequences of his own laches.

If, under the facts alleged in the pending petition, Reed has a superior right to the land under consideration, his remedy would appear to lie in an action in the courts against the Railway Company.

The papers transmitted with your letter are herewith returned.

Respectfully, (Signed) A. A. Jones, First Assistant Secretary.

Inc. No. 7404.

[File endorsement omitted.]

[fol. 357] PLAINTIFFS' EXHIBIT H—Filed June 24, 1920

19066

Department of the Interior,

General Land Office,

Washington

February, 10, 1914.

CHARLES W. REED

v.

ST. PAUL, M. & M. RY. CO.

Promulgating Departmental Decision of January 6, 1914

Register and Receiver, Seattle, Washington.

SIRS: On February 6, 1907, Charles W. Reed filed in your office application 01417, to make homestead entry for Lot 4, S. W. ¼ N. W. ¼ and W. ½ S. W. ¼, Sec. 3, T. 39 N., R. 6 E., alleging settlement on November 24, 1906.

On May 5, 1902, the St. Paul, Minneapolis and Manitoba, now the Great Northern Railway Company made lieu selection No. 43, for the S. W. ¼ N. W. ¼ Sec. 3, T. 39 N., R. 6 E., under act of August 5, 1892 (27 Stat. 360). The plat of survey for this tract was filed in your office on February 6, 1907, and on February 23, 1907, the company filed application conforming this selection to the survey and on April 13, 1908, patent No. 29 was issued to the company for said tract.

On November 22, 1913, you transmitted to this office the protest and application by Charles W. Reed to contest the patent issued to the Great Northern Railway Company for the said S. W. ¼ N. W. ¼, Sec. 3. T. 39 N., R. 6 E., and on December 6, 1913, such application and protest together with the record in the homestead application (01417) was transmitted to the Secretary of the Interior for his consideration.

On January 16, 1914, the First Assistant Secretary of the Interior denied the protest filed by Reed and returned the record to this office [fol. 358] and among other things said:

"I am of the opinion that there was no such error in the issuance of the patent to the railway company as would justify this Department in requesting the Attorney General to institute suit for the cancellation of the patent * * *" If, under the facts alleged in the pending petition, Reed has a superior right to the land under consideration, his remedy would appear to lie in an action in the Courts against the Railway Company."

Accordingly, the application or petition of Charles W. Reed is hereby finally rejected and you will notify him that he will be allowed to perfect his homestead claim for Lot 4, and the W. ½ S. W. ¼, Sec. 3, T. 39 N., R. 6 E., in accordance with instructions contained in Decision "F" of December 17, 1913, addressed to your office.

A copy of Departmental Decision of January 16, 1914, is herewith enclosed for the files of your office.

You will notify Mr. Thomas R. Benton, St. Paul, Minnesota, attorney for the Great Northern Railway Company hereof.

Very respectfully, O. G. Tallman, Commissioner. Board of Law Review, by W. B. Pugh.

[fol. 359] [File endorsement omitted.]

PLAINTIFFS' EXHIBIT I—Filed June 24, 1920

D-16674

April 22, 1914.

"F." Seattle—01417

Motion for Rehearing Denied

CHARLES W. REED

v.

ST. PAUL, MINNEAPOLIS & MANITOBA RAILWAY COMPANY

Motion for Rehearing

By departmental letter of January 16, 1914, the application of Charles W. Reed to contest the selection and patent to the above named railway company for the S. W. ¼ N. W. ¼, Sec. 3. T. 39 N., R. 6 E., W. M., Seattle, Washington land District, was denied and motion for rehearing of said decision has been filed on behalf of Reed. In said letter it was held that the facts presented did not warrant the referring of the case to the Department of Justice for the purpose of instituting a suit to cancel said patent. It was further stated that claimant's remedy, if any, was in the court to establish his title to the land. The petition does not present any new matter not considered at the time the case was formerly before the Department and the conclusion reached at that time is adhered to. The motion for rehearing is denied.

(Signed) A. A. Jones, First Assistant Secretary.

[fol. 360] [File endorsement omitted.]

PLAINTIFFS' EXHIBIT J—Filed June 24, 1920

Department of the Interior,

General Land Office,

Washington

May 6, 1916.

Homestead Entry 01417

CHARLES W. REED

vs.

ST. PAUL, MINNEAPOLIS AND MANITOBA RAILWAY COMPANY

Petition Denied

Register and Receiver, Seattle, Washington.

SIRS: On April 8, 1916, the resident attorney on behalf of Charles W. Reed, filed a petition in the office of the Secretary of the Interior, requesting the Department to procure institution of a suit to vacate the patent issued April 13, 1908, to the St. Paul, Minneapolis and Manitoba Railway Company for the S. W. ¼ N. W. ¼ Sec. 3. T. 39 N., R. 6 E. Said tract of land was formerly covered by the homestead application 01417, in the name of Charles W. Reed.

On April 18, 1916, the First Assistant Secretary of the Interior denied said petition, and on April 24, 1916, the record in the above entitled case was returned to this office with the statement that the decision of the Department had become final. A similar request on behalf of Reed was denied by the Departmental decisions on January 16, 1914, and April 22, 1914.

Accordingly, homestead application 01417, by Charles W. Reed for the above described tract will stand rejected. Two copies of said Departmental decision of April 18, 1916, are herewith enclosed for the files of your office. One copy of said decision will be furnished the resident attorney of Charles W. Reed. You will advise Reed [fol. 361] hereof. You will make the proper notations upon the records of your office, referring to this letter by date and initial. The resident attorney for Charles W. Reed will be furnished a copy of this letter.

Very respectfully, D. K. Parrott, Acting Assistant Commissioner. Board of Law Review, by W. B. Pugh.

[fol. 362] [File endorsement omitted.]

PLAINTIFFS' EXHIBIT K—Filed June 24, 1920

19216

Department of the Interior,

General Land Office

Washington, May 27, 1914.

CHARLES W. REED

vs.

ST. PAUL, M. & M. RY. CO.

Promulgating Departmental Decision of April 22, 1914. Case Closed

Register and Receiver, Seattle, Washington.

SIRS: On February 6, 1907, Charles W. Reed filed in your office application No. 01417, to make homestead entry for Lot 4, S. W. ¼ N. W. ¼ and W. ½ S. W. ¼ Sec. 3, T. 39 N. R. 6 E., alleging settlement on November 24, 1906.

On May 5, 1902, the St. Paul, Minneapolis and Manitoba now the Great Northern Railway Company, made lieu selection No. 45 for the S. W. ¼ N. W. ¼ Sec. 3, T. 39 N., R. 6 E., under act of August 5, 1892 (27 Stat. 390).

The plat of survey for this tract was filed in your office on February 6, 1907, and on February 23, 1907, the company filed application conforming this selection to the survey and on April 13, 1908, patent No. 29 was issued to the company under said tract.

On November 22, 1913, you transmitted to this office a protest and application by Charles W. Reed, to contest the patent issued to the Great Northern Railway Company, for said S. W. ¼ N. W. ¼, Sec. 3, T. 39 N., R. 6 E., and on December 6, 1913, such application and protest, together with the record in the homestead application (01417) was transmitted to the Secretary of the Interior for his consideration.

[fol. 363] On January 16, 1914, the First Assistant Secretary of the Interior denied the protest filed by Reed and returned the record to this office, and by letter "F" of February 10, 1914, said application of Charles W. Reed was finally rejected, and you were directed to notify him that he would be allowed to perfect his homestead claim for Lot 4, and the W. ½ S. W. ¼, Sec. 3, T. 39 N., R. 6 E., in accordance with instructions contained in decision "F" of December 17, 1913, addressed to your office.

On March 19, 1914, Mr. Edwin H. Flick, attorney for Charles W. Reed, filed in the office of the Secretary of the Interior a motion for

rehearing of departmental decision of January 16, 1914. On April 22, 1914, the First Assistant Secretary of the Interior considered the entire record in the claim of Charles W. Reed, and denied the motion for rehearing of departmental decision dated January 16, 1914, and on May 1-, 1914, the Department declared its decision of April 22, 1914, final and returned the record in the above entitled cause to this office. This action finally closed the matter. Two copies of said departmental decision of April 22, 1914, are herewith enclosed for your use and the files of your office.

You will notify Thomas R. Benton, St. Paul, Minnesota, attorney for the Great Northern Railway Company.

Very respectfully, C. M. Bruce, Assistant Commissioner.

[fol. 364] PLAINTIFFS' EXHIBIT L

Circular No. 10

Department of the Interior,

General Land Office

Suggestions to Homesteaders and Persons Desiring to Make Homestead Entries—Approved April 20, 1911

Washington

Government Printing Office

1911

List of United States Land Offices

The General Land Office does not issue maps showing the location of vacant public land subject to entry. This information can be reliably obtained only from the records of the various district land offices, which are located as follows:

Alabama:
Montgomery.
Alaska:
Fairbanks.
Juneau.
Nome.
Arizona:
Phœnix.
Arkansas:
Camden.
Harrison.
Little Rock.
California:
Eureka.
Independence.
Los Angeles.
Redding.
Sacramento.
San Francisco.
Susanville.
Visalia.
Colorado:
Del Norte.
Denver.
Durango.
Glenwood Springs.
Hugo.
Lamar.
Leadville.
Montrose.
Pueblo.
Sterling.
Florida:
Gainesville.

Idaho:
Blackfoot.
Boise.
Cœur d'Alene.
Hailey.
Lewiston.
Kansas:
Dodge City.
Topeka.
Louisiana:
Baton Rouge.
Michigan:
Marquette.
Minnesota:
Cass Lake.
Crookston.
Duluth.
Mississippi:
Jackson.
Missouri:
Springfield.
Montana:
Billings.
Bozeman.
Glasgow.
Great Falls.
Havre.
Helena.
Kalispell.
Lewistown.
Miles City.
Missoula.

Nebraska:
Alliance.
Broken Bow.
Lincoln.
North Platte.
O'Neill.
Valentine.
Nevada:
Carson City.
New Mexico:
Clayton.
Fort Sumner.
Las Cruces.
Roswell.
Santa Fe.
Tucumcari.
North Dakota:
Bismarck.
Devils Lake.
Dickinson.
Fargo.
Minot.
Williston.
Oklahoma:
Guthrie.
Lawton.
Woodward.
Oregon:
Burns.
La Grande.
Lakeview.
Portland.

Oregon—Continued.
Roseburg.
The Dalles.
Vale.
South Dakota
Bellefourche.
Chamberlain.
Gregory.
Lemmon.
Pierre.
Rapid City.
Timber Lake.
Utah:
Salt Lake City.
Vernal.
Washington:
North Yakima.
Olympia.
Seattle.
Spokane.
Vancouver.
Walla Walla.
Waterville.
Wisconsin:
Wausau.
Wyoming:
Buffalo.
Cheyenne.
Douglas.
Evanston.
Lander.
Sundance.

No specific descriptions of the character of the land, climate, water, or timber can be given by the General Land Office.

Unoccupied public lands, subject to settlement and entry, are to be found in all the States and Territories west of the Mississippi River, except Iowa and Texas. There is also considerable vacant public land in the States of Michigan, Florida, Alabama, and Mississippi.

Persons who desire to make homestead entry should first decide where they wish to locate, then go or write to the local land office of the district in which the lands are situated, and obtain from the records diagrams of vacant lands.

A personal inspection of the lands should be made to ascertain if they are suitable, and, when satisfied on this point, entry can be made at the local land office in the manner prescribed by law, under the direction of the local land officers, who will give the applicant full information. Should a person desire to obtain information in regard

to vacant lands in any district before going there for personal inspection, he should address the register and receiver of the particular local land office, who will give such information as is available. The local land officers can not, however, be expected to furnish extended lists of vacant lands subject to entry, except through township plats, which they are authorized to sell as hereinafter explained.

[fol. 365] Suggestions to Homesteaders and Persons Desiring to Make Homestead Entries

Department of the Interior,
General Land Office,
Washington, D. C., April 20, 1911.

1. Persons desiring to make homestead entries should first fully inform themselves as to the character and quality of the lands they desire to enter, and should in no case apply to enter until they have visited and fully examined each legal subdivision for which they make application, as satisfactory information as to the character and occupancy of public lands can not be obtained in any other way.

As each applicant is required to swear that he is well acquainted with the character of the land described in his application, and as all entries are made subject to the rights of prior settlers, the applicant can not make the affidavit that he is acquainted with the character of the land, or be sure that the land is not already appropriated by a settler, until after he has actually inspected it.

Information as to whether a particular tract of land is subject to entry may be obtained from the register or receiver of the land district in which the tract is located, either through verbal or written inquiry, but these officers must not be expected to give information as to the character and quality of unentered land or to furnish extended lists of lands subject to entry, except through plats and diagrams which they are authorized to make and sell as follows:

For a township diagram showing entered land only	$1.00
For a township plat showing form of entries, names of claimants, and character of entries	2.00
For a township plat showing form of entries, names of claimants, character of entry, and number	3.00
For a township plat showing form of entries, names of claimants, character of entry, number, and date of filing or entry, together with topography, etc	4.00

Purchasers of township diagrams are entitled to definite information as to whether each smallest legal subdivision, or lot, is vacant public land. Registers and receivers are therefore required in case of an application for a township diagram showing vacant lands to plainly check off with a cross every lot or smallest legal subdivision in the township which is not vacant, leaving the vacant tracts unchecked. There is no authority for registers and receivers to charge and receive a fee of 25 cents for plats and diagrams of a section or part of a section of a township.

If because of the pressure of current business relating to the entry of lands registers and receivers are unable to make the plats or diagrams mentioned above, they may refuse to furnish the same and return the fee to the applicant, advising him of their reason for not furnishing the plats requested, that he may make the plats or diagrams himself, or have same made by his agent or attorney, and that he may have access to the plats and tract books of the local land office for this purpose, provided such use of the records will not interfere with the orderly dispatch of the public business.

A list showing the general character of all the public lands remaining unentered in the various counties of the public-land States on the 30th day of the preceding June may be obtained at any time by addressing "The Commissioner of the General Land Office, Washington, D. C."

All blank forms of affidavits and other papers needed in making application to enter or in making final proofs can be obtained by applicants and entrymen from the land office for the district in which the land lies.

2. Kind of Land Subject to Homestead Entry.—All unappropriated surveyed public lands adaptable to any agricultural use are subject to homestead entry if they are not mineral or saline in character and are not occupied for the purposes of trade or business and have not been embraced within the limits of any withdrawal, reservation, or incorporated town or city, but homestead entries on lands within certain areas (such as lands in Alaska, lands withdrawn under the reclamation act, certain ceded Indian lands, lands within abandoned military reservations, agricultural lands within national forests, lands in western and central Nebraska, and lands withdrawn, classified, or valuable for coal) are made subject to the particular requirements of the laws under which such lands are opened to entry. None of these particular requirements are set out in these suggestions, but information as to them may be obtained by either verbal or written inquiries addressed to the register and receiver of the land office of the district in which such lands are situated.

How Claims under the Homestead Law Originate

3. Claims under homestead laws may be initiated either by settlement on surveyed or unsurveyed lands of the kind mentioned in the foregoing paragraph, or by the filing of a soldier's or sailor's declaratory statement, or by the presentation of an application to enter any surveyed lands of that kind.

4. Settlements may be made under the homestead laws by all persons qualified to make either an original or a second homestead entry, as explained in paragraphs 6 and 13, and in order to make settlement a settler must personally go upon and improve or establish residence on the land he desires. By making settlement in this way the settler gains the right to enter the land settled upon as against all other persons, but not as against the Government should the land be withdrawn by it for other purposes.

A settlement made on any part of a surveyed technical quarter section gives the settler the right to enter all of that quarter section which is then subject to settlement, although he may not place improvements on each 40-acre subdivision; but if the settled desires to initiate a claim to surveyed tracts which form a part of more than one technical quarter section he should perform some act of settlement—that is, make some improvement—on each of the smallest legal subdivisions desired. When settlement is made on unsurveyed lands, the settler must plainly mark the boundaries of all the lands claimed by him.

[fol. 366] The settlement must be made by the settler in person, and can not be made by his agent, and each settler must, within a reasonable time after making his settlement, establish and thereafter continuously maintain an actual residence on the land, and if he fails to do this, or, in case of his death, his widow, heirs, or devisees fail to continue cultivation or residence, or if he, or his widow, heirs, or devisees, fail to make entry within three months from the time he first settles on surveyed land, or within three months from the filing in the local land office of the plat of survey of unsurveyed lands on which he made settlement, the right of making entry of the lands settled on will be lost in case of an adverse claim, and the land will become subject to entry by the first qualified applicant.

5. Soldiers' and sailors' declaratory statements may be filed in the land office for the district in which the lands desired are located by any persons who have been honorably discharged after ninety days' service in the Army or Navy of the United States during the War of the Rebellion or during the Spanish-American War or the Philippine insurrection. Declaratory statements of this character may be filed either by the soldier or sailor in person or through his agent acting under a proper power of attorney, but the soldier or sailor must make entry of the land in person, and not through his agent, within six months from the filing of his declaratory statement, or he may make entry in person without first filing a declaratory statement if he so chooses. If a declaratory statement is filed by a soldier or sailor in person, it must be executed by him before one of the officers mentioned in paragraph 16, in the county or land district in which the land is situated; if filed through an agent, the affidavit of the agent must be executed before one of the officers above mentioned, but the soldier's affidavit may be executed before any officer using a seal and authorized to administer oaths and not necessarily within the county or land district in which the land is situated.

By Whom Homestead Entries May Be Made

6. Homestead entries may be made by any person who does not come within either of the following classes:

(a) Married women, except as hereinafter stated.

(b) Persons who have already made homestead entry, except as hereinafter stated.

(c) Foreign-born persons who have not declared their intention to become citizens of the United States.

(d) Persons who are the owners of more than 160 acres of land in the United States.

(e) Persons under the age of 21 years who are not the heads of families, except minors who make entry as heirs, as hereinafter mentioned, or who have served in the Army or Navy during the existence of an actual war for at least 14 days.

(f) Persons who have acquired title to or are claiming, under any of the agricultural public-land laws, through settlement or entry made since August 30, 1890, any other lands which, with the lands last applied for, would amount in the aggregate to more than 320 acres. See, however, modification hereof in the regulations concerning enlarged homestead entries (par. 52).

7. A married woman who has all of the other qualifications of a homesteader may make a homestead entry under any one of the following conditions:

(a) Where she has been actually deserted by her husband.

(b) Where her husband is incapacitated by disease or otherwise from earning a support for his family and the wife is really the head and main support of the family.

(c) Where the husband is confined in a penitentiary and she is actually the head of the family.

(d) Where the married woman is the heir of a settler or contestant who dies before making entry.

(e) Where a married woman made improvements and resided on the lands applied for before her marriage, she may enter them after marriage if her husband is not holding other lands under an unperfected homestead entry at the time she applies to make entry.

8. If an entryman deserts his wife and abandons the land covered by his entry, his wife then has the exclusive right to contest the entry if she has continued to reside on the land, and on securing its cancellation she may enter the land in her own right, or she may continue her residence and make proof in the name of and as the agent for her husband, and patent will issue to him.

9. If an entryman deserts his minor children and abandons his entry after the death of his wife, the children have the same right to make proof on the entry as the wife could have exercised had she been deserted during her lifetime.

10. The marriage of the entrywoman after making entry will not defeat her right to acquire title if she continues to reside upon the land and otherwise comply with the law. A husband and wife can not, however, maintain separate residences on homestead entries held by each of them, and if, at the time of marriage, they are each holding an unperfected entry on which they must reside in order to acquire title, they can not hold both entries. In such case they may elect which entry they will retain and relinquish the other.

11. A widow, if otherwise qualified, may make a homestead entry notwithstanding the fact that her husband made an entry and not-

withstanding she may be at the time claiming the unperfected entry of her deceased husband.

12. A person serving in the Army or Navy of the United States may make a homestead entry if some member of his family is residing on the lands applied for, and the application and accompanying affidavits may be executed before the officer commanding the branch of the service in which he is engaged.

13. Second homestead entries may be made by the following classes of persons if they are otherwise qualified to make entry:

(a) By a former entryman who commuted his entry prior to June 5, 1900.

(b) By a homestead entryman who, prior to May 17, 1900, paid for lands to which he would have been afterwards entitled to receive patent without payment, under the "free-homes act." (Appendix No. 3.)

(c) By any person whose former entry was made prior to February 3, 1911, which entry has been subsequently lost, forfeited, or abandoned for any cause, provided the former entry was not canceled for fraud or relinquished or abandoned for a valuable consideration [fol. 367] in excess of the filing fees paid on said former entry. If an entryman received for relinquishing or abandoning his entry an amount in excess of the fees and commissions paid to the United States at time of making said entry, or if he sells his improvements for a sum in excess of such filing fees and relinquishes his entry in connection therewith, he can not make a second entry.

(d) By persons whose original entries have failed because of the discovery, subsequent to entry, of obstacles which could not have been foreseen and which render it impracticable to cultivate the land, or because, subsequent to entry, the land becomes useless for agricultural purposes through no fault of the entryman. There is no specific statute authorizing the making of second entries in these classes of cases, and such entries are allowed under the general equitable power of the Land Department to grant relief in cases of accident and mistake.

(e) Any person who has already made final proof for less than 160 acres under the homestead laws may, if he is otherwise qualified, make a second or additional entry for such an amount of public land as will, when added to the amount for which he has already made proof, not exceed in the aggregate 160 acres. See, however, instructions under the enlarged homestead act (par. 52).

(f) Any person desiring to make a second entry must first select and inspect the lands he intends to enter and then make application therefor on blanks furnished by the register and receiver. Each application must state the date and number of the former entry and the land office at which it was made, or give the section, township, and range in which the land entered was located. Any person coming within paragraphs (a), (b), or (c) above must state the date when and how the former entry was perfected. Any person coming within paragraph (c) above must show, by the oath of himself and some other person or persons, the time when his former entry was

lost, forfeited, or abandoned; that it was not canceled for fraud; and the consideration, if any, received for the abandonment or relinquishment.

Any person mentioned in paragraph (d) above must, in addition to the above evidence as to date and description of his former entry, date of abandonment, and receipt of consideration, show, by duly corroborated affidavit, the grounds on which he seeks relief, and that he used due diligence prior to entry to avoid any mistake.

(g) A person who has made and lost, forfeited, or abandoned an entry of less than 160 acres is not entitled to make another enrty unless he comes within paragraph (c) or (d) above. Such a person can not make another entry merely because his first entry contained les than 160 acres.

14. An additional homestead entry may be made by a person for such an amount of public lands adjoining lands then held and resided upon by him under his original entry as will, when added to such adjoining lands, not exceed in the aggregate 16 acres. An entry of this kind may be made by any person who has not acquired title to and is not, at the date of his application, claiming under any of the agricultural public-land laws, through settlement or entry made since August 30, 1890, any other lands which, with the land then applied for, would exceed in the aggregate 320 acres, but the applicant will not be required to show any of the other qualifications of a homestead entryman. See, however, instructions under the enlarged homestead act (par. 50).

15. An adjoining farm entry may be made for such an amount of public lands lying contiguous to lands owned and resided upon by the applicant as will not, with the lands so owned and resided upon, exceed in the aggregate 160 acres; but no person will be entitled to make entry of this kind who is not qualified to make an original homestead entry. A person who has made one homestead entry, although for a less amount than 160 acres, and perfected title thereto is not qualified to make an adjoining farm entry.

How Homestead Entries Are Made

16. A homestead entry may be made by the presentation to the land office of the district in which the desired lands are situated of an application properly prepared on blank forms prescribed for that purpose and sworn to before either the register or the receiver, or before a United States commissioner, or a United States court commissioner, or a judge, or a clerk of a court of record, in the county or parish in which the land lies, or before any officer of the classes named who resides in the land district and nearest and most accessible to the land, although he may reside outside of the county in which the land is situated.

17. Each application to enter and the affidavits accompanying it must recite all the facts necessary to show that the applicant is acquainted with the land; that the land is not, to the applicant's

knowledge, either saline or mineral in character; that the applicant possesses all of the qualifications of a homestead entryman; that the application is honestly and in good faith made for the purpose of actual settlement and cultivation, and not for the benefit of any other person, persons, or corporation; that the applicant will faithfully and honestly endeavor to comply with the requirements of the law as to settlement, residence, and cultivation necessary to acquire title to the land applied for; that the applicant is not acting as the agent of any person, persons, corporation, or syndicate in making such entry, nor in collusion with any person, corporation, or syndicate to give them the benefit of the land entered or any part thereof; that the application is not made for the purpose of speculation, but in good faith to obtain a home for the applicant, and that the applicant has not directly or indirectly made and will not make, any agreement or contract in any way or manner with any person or persons, corporation, or syndicate whatsoever by which the title he may acquire from the Government to the lands applied for shall inure, in whole or in part, to the benefit of any person except himself.

18. All applications to make second homestead entries must, in addition to the facts specified in the preceding paragraph, show the number and date of the applicant's original entry, the name of the land office where the original entry was made, and the description of the land covered by it, and it should state fully all of the facts which entitle the applicant to make a second entry.

19. All applications by persons claiming as settlers must, in addition to the facts required in paragraph 17, state the date and describe the acts of settlement under which they claim a preferred right of entry, and applications by the widows, devisees, or heirs of settlers [fol. 368] must state facts showing the death of the settler and their right to make entry; that the settler was qualified to make entry at the time of his death, and that the heirs or devisees applying to enter are citizens of the United States, or have declared their intentions to become such citizens, but they are not required to state facts showing any other qualifications of a homestead entryman, and the fact that they have made a former entry will not prevent them from making an entry as such heirs or devisees, nor will the fact that a person has made entry as the heir or devisee of the settler prevent him from making an entry in his own individual right, if he is otherwise qualified to do so.

20. All applications by soldiers, sailors, or their widows, or the guardians of their minor children should be accompanied by proper evidence of the soldier's or sailor's service and discharge, and of the fact that the soldier or sailor had not, prior to his death, made an entry in his own right. The application of the widow of the soldier or sailor must also show that she is unmarried, and that the right has not been exercised by any other person. Applications for the children of soldiers or sailors must show that the father died without having made entry, that the mother died or remarried without making entry, and that the person applying to make entry for them is their legally appointed guardian.

Rights of Widows, Heirs, or Devisees Under the Homestead Laws

21. If a homestead setler dies before he makes entry, his widow has the exclusive right to enter the lands covered by his settlement. If there be no widow, the right to enter the lands covered by the settlement passes to the persons who are named as heirs of the settler by the laws of the State in which the land lies. If there be no widow or heirs the right to enter the lands covered by the settlement passes to the person to whom the settler has devised his rights by a proper will; but a devisee of the claim will not be entitled to take when there is a widow or an heir of the settler. The persons to whom the settler's right of entry passes must make entry within the time named in paragraph 4 or they will forfeit their right to the next qualified applicant. They may, however, make entry after that time if no adverse claim has attached.

22. If a homestead entryman dies before making final proof, his rights under his entry will pass to his widow; if there be no widow, and the entryman's children are all minors, the right to a patent vests in them upon making publication of notice and proof of the death of the entryman without a surviving widow, that they are the only minor children and that there are no adult heirs of the entryman, or the land may be sold for the benefit of such minor children in the manner in which other lands belonging to minors are sold under the laws of the State or Territory in which the lands are located.

If the children of a deceased entryman are not all minors and his wife is dead, his rights under the entry pass to the persons who are his heirs under the laws of the State or Territory in which the lands are situated. If there be no widow or heirs of the entryman, the rights under the entry pass to the person to whom the entryman has devised his rights by proper will, but a devisee of the entry will be entitled to take only in the event there is no widow or heir of the entryman.

23. If a contestant dies after having secured the cancellation of an entry his right as a successful contestant to make entry passes to his heirs; and if the contestant dies before he has secured the cancellation of the entry he has contested, his heirs may continue the prosecution of his contest and make entry if they are successful in the contest. In either case to entitle the heirs to make entry they must show that the contestant was a qualified entryman at the date of his death; and in order to earn a patent the heirs must comply with all the requirements of the law under which the entry was made to the same extent as would have been required of the contestant had he made entry.

No foreign-born persons can claim rights as heirs under the homestead laws unless thay have become citizens of the United States or have declared their intentions to become citizens.

24. The unmarried widow, or, in case of her death or remarriage, the minor children of soldiers and sailors who were honorably dis-

charged after 90 days' actual service during the War of the Rebellion, the Spanish-American War, or the Philippine insurrection may make entry as such widow or minor children if the soldier or sailor died without making entry. The minor children must make a joint entry through their duly appointed guardian.

Residence and Cultivation.

25. The residence and cultivation required by the homestead law means a continuous maintenance of an actual home on the land entered, to the exclusion of a home elsewhere, and continuous annual cultivation of some portion of the land. A mere temporary sojourn on the land followed by occasional visits to it once in six months or oftener, will not satisfy the requirements of the homestead law, and may result in the cancellation of the entry.

The law contemplates that the entryman make the land the home of himself and his family, and the failure of his family to reside on the land with him raises a presumption against the bona fides of his residence which must be rebutted at the time of proof.

26. No specific amount of either cultivation or improvements is required where entry is made under the general homestead law, but there must in all cases be such continuous improvement and such actual cultivation as will show the good faith of the entryman. Lands covered by such a homestead entry may be used for grazing purposes if they are more valuable for pasture than for cultivation to crops. When lands of this character are used for pasturage, actual grazing will be accepted in lieu of actual cultivation. The fact that lands covered by homesteads are of such a character that they can not be successfully cultivated or pastured will not be accepted as an excuse for failure to either cultivate or graze them.

Grazing can not be accepted in lieu of cultivation when entry is made under the enlarged homestead act. (See par. 51.)

Homestead Entries for Coal Lands.—Where homestead entry is made under the act of June 22, 1910 (36 Stat., 583), for land which has been withdrawn or classified as coal land, or which is valuable for coal, the entryman must show improvements as above stated and must further comply with the requirements of the en- [fol. 369] larged homestead act of February 19, 1909 (35 Stat., 639), as to residence and cultivation; that is, he must cultivate at least one-eighth of the area of the entry to agricultural crops other than native grasses, beginning with the second year of the entry, and at least one-fourth of the area of the entry beginning with the third year of the entry and continuing to the date of proof. Entries in this class can not be commuted. (See par. 51.)

27. Actual residence on the lands entered must begin within six months from the date of all homestead entries, except additional entries and adjoining farm entries of the character mentioned in paragraphs 14 and 15, and residence with improvements and annual cultivation must be continued until the entry is five years old, except in cases hereinafter mentioned; but all entrymen who actually resided

upon and cultivated lands entered by them prior to making such entries and while the land was subject to settlement or entry by them, may make final proof at any time after entry when they can show five years' residence and cultivation.

An entryman can not claim credit for residence prior to entry during the time when the land was not subject to settlement or entry by him, as, for instance, while it was embraced in the entry of another.

Under certain circumstances leaves of absence may be granted in the manner pointed out in Paragraph 36 of these suggestions, but the entryman can not claim credit for residence during the time he is absent under such leave.

An extension of time for establishing residence can be granted only in cases where the entryman is actually prevented by climatic hindrances from establishing his residence within the required time. This extension can not be granted in advance; but on making final proof or in case a contest is instituted against the entry the entryman may show the storms, floods, blockades of snow or ice, or other climatic reasons which rendered it impossible for him to commence residence within six months from date of entry, and he must as soon as possible after the climatic hindrance disappear establish his residence on the land entered. Failure to establish residence within six months from date of entry will not necessarily result in a forfeiture of the entry, provided the residence be established prior to the intervention of an adverse claim.

After an entryman has fully complied with the law and has submitted proof he is no longer required to live on the land. But all entrymen should understand that if they discontinue their residence on the land prior to the issuance of patent they do so at their risk, and by so doing they may place themselves in such a position that they may be unable to comply with requirements made by the General Land Office, should their proof on examination be found unsatisfactory.

28. Residence and cultivation by soldiers and sailors of the classes mentioned in paragraph 5 must begin within six months from the time they file their declaratory statements regardless of the time when they make entry under such statement, but if they make entry without filing a declaratory statement they must begin their residence within six months from the date of such entry, and residence thus established must continue in good faith, with improvements and annual cultivation for at least one year, but after one year's residence and cultivation the soldier or sailor is entitled to credit on the remainder of the five-year period for the term of his actual naval or military service, or if he was discharged from the Army or Navy because of wounds received or disabilities incurred in the line of duty he is entitled to credit for the whole term of his enlistment. No credit can be allowed for military service where commutation proof is offered.

29. A soldier or sailor making entry during his enlistment in time of peace is not required to reside personally on the land, but may

receive patent if his family maintain the necessary residence and cultivation until the entry is five years old or until it has been commuted; but a soldier or sailor is not entitled to credit on account of his military service in time of peace. And if such soldier has no family, there is no way by which he can make entry and acquire title during his enlistment in time of peace.

30. Widows and minor orphan children of soldiers and sailors who make entry as such widows and children must begin their residence and cultivation of the lands entered by them within six months from the dates of their entries, or the filing of declaratory statement, and thereafter continue both residence and cultivation for such period as will, when added to the time of their husbands' or fathers' military or naval service, amount to five years from the date of the entry, and if the husbands or fathers either died in the service or were discharged on account of wounds or disabilities incurred in the line of duty, credit for the whole term of their enlistment, not to exceed four years, may be taken, but no patent will issue to such widows or children until there has been residence and cultivation by them for at least one year. No credit can be allowed for military service where commutation proof is offered.

31. Persons who make entry as the widow or heirs of settlers are not required to both reside upon and cultivate the land entered by them, but they must at least cultivate the land entered by them for such a period as, added to the time during which the settler resided on and cultivated the land, will make the required period of five years. Commutation proof may, however, be made upon showing 14 months' actual residence performed either by the settler or the heirs or widow, or in part by the settler and in part by the widow or heirs. In case of entries made under the enlarged homestead act cultivation as required by that act must be maintained by the widows or heirs. (See par. 51.) The above rules also apply to a devisee of the settlement claim in cases where a devisee is entitled to take.

32. The widow or heirs of a homestead entryman who dies before he earns patent are not required to both reside upon and cultivate the lands covered by his entry, but they must, within six months after the death of the entryman, begin cultivation on the land covered by the entry and continue same for such a period of time as will, when added to the time during which the entryman complied with the law, amount in the aggregate to the required period of five years. Commutation proof may be made showing 14 months' actual residence performed by the entryman or by the widow or heirs, or in part by the entryman and in part by the widow or heirs. In case of an entry made under the enlarge homestead act cultivation as required by that act must be maintained by the widow or heirs. (See par. 51.) The above rules also apply to a devisee of the entry in cases where the devisee is entitled to take.

33. Homestead entrymen who have been elected to either a Federal, State, or county office, after they have made entry and

[fol. 370] established an actual residence on the land covered by their entries are not required to continue such residence during their term of office, if the discharge of their bona fide official duties necessarily requires them to reside elsewhere than upon the land; but they must continue their cultivation and improvements for the required length of time. Such an officeholder can not commute, however, unless he can show at least 14 months' actual residence. (See circulars of Feb. 16 and 20, 1909, Appendix No. 13, and Oct. 18, 1907, Appendix No. 14.)

A person who makes entry after he has been elected to office is not excused from maintaining residence, but must comply with the law in the same manner as though he had not been elected.

34. Residence is not required on land covered by an adjoining farm entry of the kind mentioned in paragraph 15; but a person who makes an adjoining farm entry is not entitled to a patent until he has continued his residence and cultivation for the full five years on the land owned by him at the time he made entry, or on the adjoining lands entered by him, unless he commutes his entry after 14 months' residence on either the entered lands or the lands originally owned by him; in neither case can credit be claimed for residence on the original farm prior to the date of the adjoining farm entry.

A person who has made an additional entry of the kind mentioned in paragraph 14 for lands adjoining his original entry is not entitled to patent for the lands so entered until he can show five years' residence, either on the original entry or in part on the original and in part on the additional. No commutation of the additional entry is allowed by law in the latter case.

35. Neither residence nor cultivation by an insane homestead entryman is necessary after he becomes insane, if such entryman made entry and established residence before he became insane and complied with the requirements of the law up to the time his insanity began.

Leaves of Absence

36. Leaves of absence for one year or less may be granted to entrymen who have established actual residence on the lands entered by them in all cases where total or partial failure or destruction of crops, sickness, or other unavoidable casualty has prevented the entryman from supporting himself and those dependent upon him by a cultivation of the land.

Applications for leaves of absence should be addressed to the register and receiver of the land office where the entry was made and should be sworn to by the applicant and some disinterested person before such register and receiver or before some officer in the land district using a seal and authorized to administer oaths, except in cases where, through age, sickness, or extreme poverty, the entryman is unable to visit the district for that purpose, when the oath may be made outside of the land district. All applications of this kind should clearly set forth:

(a) The number and date of the entry, a description of the lands entered, the date of the establishment of his residence on the land, and the extent and character of the improvements and cultivation made by the applicant.

(b) The kind of crops which failed or were destroyed and the cause and extent of such failure or destruction.

(c) The kind and extent of the sickness, disease, or injury assigned, and the extent to which the entryman was prevented from continuing his residence upon the land, and, if practicable, a certificate signed by a reliable physician as to such sickness, disease, or injury, should be furnished.

(d) The character, cause, and extent of any unavoidable casualty which may be made the basis of the application.

(e) The dates from which and to which the leave of absence is requested.

An entryman can not claim credit for residence during the time he is absent under a leave of absence, but such a period of absence will not be held to break the continuity of his residence; that is, the period of residence preceding such an absence may be added to the period of residence succeeding such absence to make up the time required for either five-year or commutation proof.

Commutation of Homestead Entries

37. All original, second, and additional homestead, and adjoining farm entries may be commuted, except such entries as are made under particular laws which forbid their commutation.

Where there has been, immediately prior to the application to submit proof on a homestead entry, or immediately prior to the submission of proof, at least 14 months' actual and substantially continuous residence, accompanied by improvement and cultivation, the entryman, or his widow or heirs, may obtain patent by proving such residence, improvement, and cultivation, and paying the cost of such proof, the land office fees, and the price of the land, which is $1.25 per acre outside the limits of railroad grants and $2.50 per acre for lands within the granted limits, except as to certain lands which were opened under statutes requiring payment of a price different from that here mentioned. (See circular of Oct. 18, 1907, Appendix No. 14.)

Commutation proof can not be made on homestead entries allowed under the act of April 28, 1904 (33 Stat., 547), known as the Kinkaid act; entries under the Reclamation Act of June 17, 1902 (32 Stat., 388); entries under the enlarged homestead act (post, par. 46 et seq.); entries allowed for coal lands under the act of June 22, 1910 (36 Stat., 583), so long as the land is withdrawn or classified as coal; additional entries allowed under the act of April 28, 1904 (33 Stat., 527, Appendix No. 4); second entries allowed under the act of June 5, 1900 (31 Stat., 267, Appendix No. 5); or second entries allowed under the act of May 22, 1902 (32 Stat., 203, Appendix No. 5), when the former entry was commuted.

Homestead Final and Commutation Proof

38. Either final or commutation proof may be made at any time when it can be shown that residence and cultivation have been maintained in good faith for the required length of time, but if final proof is not made within seven years from the date of a homestead entry the entry will be canceled unless some good excuse for the failure to make the proof within the seven years is given with satisfactory final proof as to the required residence and cultivation made after the expiration of the seven years.

[fol. 371] 39. By Whom Proof May Be Offered.—Final proof must be made by the entrymen themselves, or by their widows, heirs, or devisees, and can not be made by their agents, attorneys in fact, administrators, or executors, except in the cases hereinafter mentioned. In order to submit final five-year proof the entryman, his widow, or the heir or devisee submitting proof must be a citizen of the United States. As a general rule commutation proof may be submitted by one who has declared his or her intention to become a citizen, but on entries made for land in certain reservations opened under special acts the person submitting commutation proof must be a citizen of the United States.

An entrywoman who marries after making an entry must, in submitting proof, show the citizenship of her husband, as she by her marriage takes his status in respect to citizenship.

(a) If an entryman becomes insane after making his entry and establishing residence, patent will issue to the entryman on proof by his guardian or legal representative that the entryman had complied with the law up to the time his insanity began. In such a case if the entryman is an alien and has not been fully naturalized evidence of his declaration of intention to become a citizen is sufficient.

(b) Where entries have been made for minor orphan children of soldiers or sailors, proof may be offered by their guardian, if any, if the childern are still minors at the time the proof should be made.

(c) When an entryman has abandoned the land covered by his entry and deserted his wife, she may make final or commutation proof as his agent, or, if his wife be dead and the entryman has deserted his minor children, they may make the same proof as his agent, and patent will issue in the name of the entryman.

(d) When an entryman does leaving children, all of whom are minors, and both parents are dead, the executor or administrator of the entryman, or the guardian of the children, may, at any time within two years after the death of the surviving parent, sell the land for the benefit of the children by proper proceedings in the proper local court, and patent will issue to the purchaser; but if the land is not so sold, patent will issue to the minors upon proof of death, heirship, and minority being made by such administrator or guardian.

40. How Proofs May Be Made.—Final or commutation proofs may be made before any of the officers mentioned in paragraph 16 as being authorized to administer oaths to applicants.

Any person desiring to make homestead proof should first forward a written notice of his desire to the register and receiver of the land office, giving his post-office address, the number of his entry, the name and official title of the officer before whom he desires to make proof, the place at which the proof is to be made, and the name and post-office addresses of at least four of his neighbors who can testify from their own knowledge as to facts which will show that he has in good faith complied with all the requirements of the law.

41. Publication Fees.—Applicants shall hereafter be required to make their own contracts for publishing notice of intention to make proof, and they shall make payment therefor directly to the publishers, the newspaper being designated and the notice prepared by the register.

42. Duty of Officers Before Whom Proofs Are Made.—On receipt of the notice mentioned in the preceding paragraph, the register will issue a notice naming the time, place, and officer before whom the proof is to be made and cause the same to be published once a week for five consecutive weeks in a newspaper of established character and general circulation published nearest the land, and also post a copy of the notice in a conspicuous place in his office.

On the day named in the notice the entryman must appear before the officer designated to take proof with at least two of the witnesses named in the notice; but if for any reason the entryman and his witnesses are unable to appear on the date named, the officer should continue the case from day to day until the expiration of ten days, and the proof may be taken on any day within that time when the entryman and his witnesses appear, but they should, if it is at all possible to do so, appear on the day mentioned in the notice. Entrymen are advised that they should, whenever it is possible to do so, offer their proofs before the register or receiver, as it may be found necessary to refer all proofs made before other officers to a special agent for investigation and report before patent can issue, while, if the proofs are made before the register or receiver, there is less likelihood of this being done, and there is less probability of the proofs being incorrectly taken. By making proof before the register or receiver the entrymen will also save the fees which they are required to pay other officers, as they will be required under the law to pay the register and receiver the same amount of fees in each case, regardless of the fact that the proof may have been taken before some other officer.

Entrymen are cautioned against improvidently and improperly commuting their entries, and are warned that any false statement made in either their commutation or final proof may result in their indictment and punishment for the crime of perjury.

43. Fees and Commissions.—When a homesteader applies to make entry he must pay in cash to the receiver a fee of $5 if his entry is for 80 acres or less, or $10 if he enters more than 80 acres. And in addition to this fee he must pay, both at the time he makes entry and final proof, a commission of $1 for each 40-acre tract entered

outside of the limits of a railroad grant and $2 for each 40-acre tract entered within such limits. Fees under the enlarged homestead act are the same as above, but the commissions are based upon the area of the land embraced in the entry (see par. 48). On all final proofs made before either the register or receiver, or before any other officer authorized to take proofs, the register and receiver are entitled to receive 15 cents for each 100 words reduced to writing, and no proof can be accepted or approved until all fees have been paid.

In all cases where lands are entered under the homestead laws in Arizona, California, Colorado, Idaho, Montana, Nevada, New Mexico, Oregon, Utah, Washington, and Wyoming the commission due to the register and receiver on entries and final proofs, and the testimony fees under final proofs, are 50 per cent more than those above specified, but the entry fee of $5 or $10, as the case may be, remains the same in all the States.

United States commissioners, United States court commissioners, judges, and clerks are not entitled to receive a greater sum than 25 cents for each oath administered by them, except that they are entitled to receive $1 for administering the oath to each entryman and each final proof witness to final proof testimony, which has been reduced to writing by them.

44. The alienation of all or any part of the land embraced in a homestead prior to making proof, except for the public purposes [fol. 372] mentioned in section 2288, Revised Statutes (see Appendix No. 1), will prevent the entryman from making satisfactory proof, since he is required to swear that he has not alienated any part of the land except for the purposes mentioned in section 2288, Revised Statutes.

A mortgage by the entryman prior to final proof for the purpose of securing money for improvements, or for any other purpose not inconsistent with good faith, is not considered such an alienation of the land as will prevent him from submitting satisfactory proof. In such a case, however, should the entry be canceled for any reason prior to patent, the mortgagee would have no claim on the land or against the United States for the money loaned.

Alienation After Proof and Before Patent.—The right of a homestead entryman to patent is not defeated by the alienation of all or a part of the land embraced in his entry after the submission of final proof and prior to patent, provided the proof submitted is satisfactory. Such an alienation is, however, at the risk of the entryman, for if the reviewing officers of the Land Department subsequently find the final proof so unsatisfactory that it must be wholly rejected and new proof required, the entryman can not then truthfully make the nonalienation affidavit required by section 2291, Revised Statutes, and his entry must in consequence be canceled. The purchaser takes no better title than the entryman had, and if the entry is canceled purchaser's title must necessarily fail.

45. Relinquishments.—A homestead entryman, or in case of his death, his statutory successor, as explained in paragraph 22, may

file a written relinquishment of his entry, and on the filing of such relinquishment in the local land office the land formerly covered by the entry becomes at once subject to entry by the first qualified applicant.

Relinquishments run to the United States alone, and no person obtains any right to the land by the mere purchase of a relinquishment of a filing or entry.

Entries made for the purpose of holding the land for speculation and sale of the relinquishments are illegal and fraudulent. Every effort will be made to prevent such frauds and to detect and punish the perpetrators.

Purchasers of relinquishments of fraudulent filings or entries should understand that they purchase at their own risk so far as the United States is concerned, and they must seek their own remedies under local laws against those who by imposing such relinquishments upon them have obtained their money without valuable consideration.

Enlarged Homestead Entries.

46. Kind of Land Subject to Entry.—The first section of the act of February 19, 1909 (35 Stat., 639; see Appendix No. 15), provides for the making of homestead entries for an area of 320 acres, or less of nonmineral, nontimbered, nonirrigable public land in the States of Colorado, Montana, Nevada, Oregon, Utah, Washington, Wyoming, and in the Territories of Arizona and New Mexico. By the first section of the act approved June 17, 1910 (36 Stat., 531); see Appendix No. 15), the same kind of entries are allowed to be made in the State of Idaho.

The terms "arid" or "nonirrigable" land, as used in these acts, are construed to mean land which, as a rule, lacks sufficient rainfall to produce agricultural crops without the necessity of resorting to unusual methods of cultivation, such as the system commonly known as "dry farming," and for which there is no known source of water supply from which such land may be successfully irrigated at a reasonable cost.

Therefore lands containing merchantable timber, mineral lands, and lands within a reclamation project, or lands which may be irrigated at a reasonable cost from any known source of water supply may not be entered under these acts. Minor portions of a legal subdivision susceptible of irrigation from natural sources, as, for instance, a spring, will not exclude such subdivision from entry under these acts, provided, however, that no one entry shall embrace in the aggregate more than 40 acres of such irrigable lands.

47. Designation of Lands.—From time to time lists designating the lands which are subject to entry under these acts are sent to the registers and receivers in the States affected, and they are instructed immediately upon the receipt of such lists to note the same upon their tract books. In the order designating land a date is fixed on which such designation will become effective. Until such date no

applications to enter can be received and no entries allowed under these acts, but on or after the date fixed it is competent for the registers and receivers to dispose of applications for land designated under the provisions of these acts, in like manner as other applications for public lands.

The fact that lands have been designated as subject to entry is not conclusive as to the character of such lands, and should it afterwards develop that the land is not of the character contemplated by the above acts the designation may be canceled; but where an entry is made in good faith under the provisions of these acts, such designation will not thereafter be modified to the injury of anyone who, in good faith, has acted upon such designation. Each entryman must furnish affidavit as required by section 2 of the acts.

48. Compactness—Fees.—Lands entered under the enlarged homestead acts must be in a reasonably compact form and in no event exceed 1½ miles in length.

The acts provide that the fees shall be the same as those now required to be paid under the homestead laws; therefore, while the fees may not in any one case exceed the maximum fee of $10 required under the general homestead law, the commissions will be determined by the area of the land embraced in the entry.

49. Form of Application.—Applications to make entry under these acts must be submitted on forms prescribed by the General Land Office, and in case of an original entry on No. 4—003.

The affidavit of an applicant as to the character of the land must be corroborated by two witnesses. It is not necessary that such witnesses be acquainted with the applicant, and if they are not so acquainted their affidavits should be modified accordingly.

50. Additional Entries.—Sections 3 of the acts provide that any homestead entrymen of lands of the character described in the first sections of the acts, upon which entry final proof has not been made, may enter such other lands subject to the provisions of the acts, contiguous to the former entry, which shall not, together with the [fol. 373] lands embraced in the original entry, exceed 320 acres, and that residence upon and cultivation of the original entry shall be accepted as equivalent to residence upon and cultivation of the additional entry.

These sections contemplate that lands may, subsequent to entry, be classified or designated by the Secretary of the Interior as falling within the provisions of these acts, and in such cases an entryman of such lands may, at any time prior to final proof on his original entry make such additional entry, provided he is otherwise qualified. Applicants for such additional entries must tender the proper fees and commissions, and make application and affidavit on the form prescribed (No. 4—004). Entrymen who have made final proof on their original entries are not qualified to make additional entries.

51. Final Proof on Original and Additional Entries—Commutation Not Allowed.—Final proof must be made as in ordinary home-

stead cases, and in addition to the showing required of ordinary homestead entrymen it must be shown that at least one-eighth of the area embraced in the entry has been continuously cultivated to agricultural crops other than native grasses, beginning with the second year of the entry, and that at least one-fourth of the area embraced in the entry has been continuously cultivated to agricultural crops other than native grasses, beginning with the third year of the entry and continuing to date of final proof.

Final proof submitted on an additional entry must show that the area of such entry required by the acts to be cultivated has been cultivated in accordance with such requirement; or that such part of the original entry as will, with the area cultivated in the additional entry, aggregate the required proportion of the combined entries, has been cultivated in the manner required by the acts.

Proof must be made on the original entry within the statutory period of seven years from the date of the entry; and if it can not be shown at that time that the cultivation has been such as to satisfy the requirements of the acts as to both entries it will be necessary to submit supplemental proof on the additional entry at the proper time. But proof should be made at the same time to cover both entries in all cases where the residence and cultivation are such as to meet the requirements of the acts.

Commutation of either original or additional entry made under these acts is expressly forbidden.

52. Right of Entry.—Homestead entries under the provisions of section 2289 of the Revised Statutes, for 160 acres or less, may be made by qualified persons within the States and Territories named upon lands subject to such entry, whether such lands have been designated under the provisions of these acts or not. But those who make entry under the provisions of these acts can not afterwards make homestead entry under the provisions of the general homestead law.

A person who has, since August 30, 1890, entered and acquired title to 320 acres of land under the agricultural land laws (which is construed to mean the timber and stone, desert land, and homestead laws), is not entitled to make entry under these acts; neither is a person who has acquired title to 160 acres under the general homestead law entitled to make another homestead entry under these acts, unless entitled to the benefits of section 2 of the act of June 5, 1900 (31 Stat., 267), or section 2 of the act of May 22, 1902 (32 Stat., 203, Appendix No. 5).

If, however, a person is a qualified entryman under the homestead laws of the United States, he may be allowed to enter 320 acres under these acts, or such a less amount as when added to the lands previously entered or held by him under the agricultural land laws shall not exceed in the aggregate 480 acres.

53. Constructive Residence on Certain Lands in Utah.—The sixth section of the act of February 19, 1909 (35 Stat., 639, Appendix No. 15), provides that not exceeding 2,000,000 acres of land in the State

of Utah, which do not have upon them sufficient water suitable for domestic purposes as will render continuous residence upon such lands possible, may be designated by the Secretary of the Interior as subject to entry under the provisions of that act; with the exception, however, that entrymen of such lands, will not be required to prove continuous residence thereon. This act provides in such cases that all entrymen must reside within such distance of the land entered as will enable them successfully to farm the same as required by the act; and no attempt will be made at this time to determine how far from the land an entryman will be allowed to reside, as it is believed that the proper determination of that question will depend upon the cir-stnces of each case.

Applications to enter under section 6 of this act will not be received until the date fixed in the order designating the lands as subject to entry under this section. Lists of lands designated under this section will be from time to time furnished to the registers and receivers, who will be instructed to note same on their tract books immediately upon their receipt. These lists will fix a date on which the designations will become effective. Applications under this section must be submitted on form No. 4—003a.

Final proof under this section must be made as in ordinary homestead entries, except that proof of residence on the land will not be required, in lieu of which the entryman will be required to show that, from the date of entry until the time of making final proof, he resided within such distance from said land as enabled him to successfully farm the same. Such proof must also show that not less than one-eighth of the entire area of land entered was cultivated during the second year, not less than one-fourth during the third year and not less than one-half during the fourth and fifth years after entry.

54. Constructive Residence Permitted on Certain Lands in Idaho.—The sixth section of the act of June 17, 1910 (36 Stat., 531), provides that not exceeding 320,000 acres of land in the State of Idaho, which do not have upon them sufficient water suitable for domestic purposes as will render continuous residence upon such lands possible, may be designated by the Secretary of the Interior as subject to entry under the provisions of this act, with the exception, however, that entrymen, of such lands will not be required to prove continuous residence thereon. This section provides, in such cases, that after six months from date of entry and until final proof, all entrymen must reside not more than 20 miles from the land entered, and be engaged personally in preparing the soil for seed, seeding, cultivating, and harvesting crops upon the land during the usual seasons for such work, unless prevented by sickness, or other unavoidable cause. It is further provided that leaves of absence from the residence established under this section, may be granted upon the same terms and conditions as are required from other homestead entrymen.

[fol. 374] Applications to enter under this section of this act will not be received before the date fixed in the order designating the

land as subject to entry under this section. Lists of lands designated under this section will from time to time be furnished the registers and receivers who will be instructed to note the same on their tract books immediately upon their receipt. In the lists furnished the registers and receivers a date will be fixed on which the designation will become effective. Applications under this section must be submitted on form 4—003a.

The final proof under this section must be made as in ordinary homestead entries, except that proof of residence on the land will not be required, in lieu of which the entryman will be required to show that, from the expiration of six months after the date of original entry and until the time of making final proof, he resided not more than 20 miles from the land entered and was personally engaged in farming the same as required by said act. Such proof must also show that not less than one-eighth of the entire area of the land entered was cultivated during the second year; not less than one-fourth during the third year; and not less than one-half during the fourth and fifth years.

55. Officers Before Whom Applications and Proofs May Be Made.—The acts provide that any person applying to enter land under the provisions thereof shall make and subscribe before the proper officer an affidavit, etc. The term "proper officer," as used herein, is held to mean any officer authorized to take affidavits or proof in homestead cases.

Fred Dennett, Commissioner.

Approved April 20, 1911. Walter L. Fisher, Secretary.

[fol. 375] Appendix

(No. 1)

United States Revised Statutes

Sec. 2288. Any bona fide settler under the preemption, homestead, or other settlement law shall have the right to transfer by warranty against his own acts any portion of his claim for church, cemetery, or school purposes, or for the right of way of railroads, telegraph, telephones, canals, reservoirs, or ditches for irrigation or drainage across it; and the transfer for such public purposes shall in no way vitiate the right to complete and perfect the title to his claim. (As amended by act Mar. 3, 1905.)

Sec. 2289. Every person who is the head of a family, or who has arrived at the age of twenty-one years, and is a citizen of the United States, or who has filed his declaration of intention to become such, as required by the naturalization laws, shall be entitled to enter one quarter-section, or a less quantity, of unappropriated public lands, to be located in a body in conformity to the legal subdivisions of the public lands; but no person who is the proprietor of more than one

hundred and sixty acres of land in any State or Territory shall acquire any right under the homestead law. And every person owning and residing on land may, under the provisions of this section, enter other land lying contiguous to his land, which shall not, with the land so already owned and occupied, exceed in the aggregate one hundred and sixty acres. (As amended by act Mar. 3, 1891.)

Sec. 2290. That any person applying to enter land under the preceding section shall first make and subscribe before the proper officer and file in the proper land office an affidavit that he or she is the head of a family, or is over twenty-one years of age, and that such application is honestly and in good faith made for the purpose of actual settlement and cultivation, and not for the benefit of any other person, persons, or corporation, and that he or she will faithfully and honestly endeavor to comply with all the requirements of law as to settlement, residence, and cultivation necessary to acquire title to the land applied for; that he or she is not acting as agent of any person, corporation, or syndicate in making such entry, nor in collusion with any person, corporation, or syndicate to give them the benefit of the land entered, or any part thereof, or the timber thereon; that he or she does not apply to enter the same for the purpose of speculation, but in good faith to obtain a home for himself, or herself, and that he or she has not directly or indirectly made, and will not make, any agreement or contract in any way or manner, with any person or persons, corporation, or syndicate whatsoever, by which the title which he or she might acquire from the Government of the United States should inure, in whole or in part, to the benefit of any person, except himself, or herself, and upon filing such affidavit with the register or receiver on payment of five dollars, when the entry is of not more than eighty acres, and on payment of ten dollars, when the entry is for more than eighty acres, he or she shall thereupon be permitted to enter the amount of land specified. (As amended by act Mar. 3, 1891.)

Sec. 2291. No certificate, however, shall be given, or patent issued therefor, until the expiration of five years from the date of such entry; and if at the expiration of such time, or at any time within two years thereafter, the person making such entry; or if he be dead, his widow; or in case of her death, his heirs or devisee; or in case of a widow making such entry, her heirs or devisee, in case of her death, proves by two credible witnesses that he, she, or they have resided upon or cultivated the same for the term of five years immediately succeeding the time of filing the affidavit, and makes affidavit that no part of such land has been alienated, except as provided in section twenty-two hundred and eighty-eight, and that he, she, or they will bear true allegiance to the Government of the United States; then, in such case, he, she, or they, if at that time citizens of the United States, shall be entitled to a patent, as in other cases provided by law.

Sec 2292. In case of the death of both father and mother, leaving an infant child or children under twenty-one years of age, the right and fee shall inure to the benefit of such infant child or chil-

dren; and the executor, administrator, or guardian may, at any time within two years after the death of the surviving parent, and in accordance with the laws of the State in which such children, for the time being, have their domicile, sell the land for the benefit of such infants, but for no other purpose; and the purchaser shall acquire the absolute title by the purchase, and be entitled to a patent from the United States on the payment of the office fees and sum of money above specified.

Sec. 2293. In case of any person desirous of availing himself of the benefits of this chapter, but who, by reason of actual service in the military or naval service of the United States, is unable to do the personal preliminary acts at the district land office which the preceding sections require; and whose family, or some member thereof, is residing on the land which he desires to enter, and upon which a bona fide improvement and settlement have been made, such person may make the affidavit required by law before the officer commanding in the branch of the service in which the party is engaged, which affidavit shall be as binding in law, and with like penalties, as if taken before the register or receiver; and upon such affidavit being filed with the register by the wife or other representative of the party, the same shall become effective from the date of such filing, provided the application and affidavit are accompanied by the fee and commissions as required by law.

Sec. 2294. That hereafter all proofs, affidavits, and oaths of any kind whatsoever required to be made by applicants and entrymen under the homestead, preemption, timber-culture, desert-land, and timber and stone acts, may, in addition to those now authorized to take such affidavits, proofs, and oaths, be made before any United States commissioner or commissioner of the court exercising Federal jurisdiction in the Territory or before the judge or clerk of any court of record in the county, parish, or land district in which the [fol. 376] lands are situated: Provided, That in case the affidavits, proofs, and oaths hereinbefore mentioned be taken out of the county in which the land is located the applicant must show by affidavit, satisfactory to the Commissioner of the General Land Office, that it was taken before the nearest or most accessible officer qualified to take said affidavits, proofs, and oaths in the land districts in which the lands applied for are located; but such showing by affidavit need not be made in making final proof if the proof be taken in the town or city where the newspaper is published in which the final proof notice is printed. The proof, affidavit, and oath, when so made and duly subscribed, or which may have heretofore been so made and duly subscribed, shall have the same force and effect as if made before the register and receiver, when transmitted to them with the fees and commissions allowed and required by law. That if any witness making such proof, or any applicant making such affidavit or oath, shall knowingly, willfully, or corruptly swear falsely to any material matter contained in said proofs, affidavits, or oaths he shall be deemed guilty of perjury, and shall be liable to the same pains and

penalties as if he had sworn falsely before the register. That the fees for entries and for final proofs, when made before any other officer than the register and receiver, shall be as follows:

"For each affidavit, twenty-five cents.

"For each deposition of claimant or witness, when not prepared by the officer, twenty-five cents.

"For each deposition of claimant or witness, prepared by the officer, one dollar.

"Any officer demanding or receiving a greater sum for such service shall be guilty of a misdemeanor, and upon conviction shall be punished for each offense by a fine not exceeding one hundred dollars." (As amended by act Mar. 4, 1904.)

* * * * * * *

Sec. 2296. No lands acquired under the provisions of this chapter shall in any event become liable to the satisfaction of any debt contracted prior to the issuing of the patent therefor.

Sec. 2297. If, at any time after the filing of the affidavit, as required in section twenty-two hundred and ninety, and before the expiration of the five years mentioned in section twenty-two hundred and ninety-one, it is proved, after due notice to the settler, to the satisfaction of the register of the land office, that the person having filed such affidavit has actually changed his residence, or abandoned the land for more than six months at any time, then and in that event the land so entered shall revert to the Government: Provided, That where there may be climatic reasons the Commissioner of the General Land Office may, in his discretion, allow the settler twelve months from the date of filing in which to commence his residence on said land under such rules and regulations as he may prescribe. (As amended by act Mar. 3, 1881.)

Sec. 2298. No person shall be permitted to acquire title to more than one quarter section under the provisions of this chapter.

Sec. 2299. Nothing contained in this chapter shall be so construed as to impair or interfere in any manner with existing preemption rights; and all persons who may have filed their applications for a preemption right prior to the twentieth day of May, eighteen hundred and sixty-two, shall be entitled to all the privileges of this chapter.

Sec. 2300. No person who has served, or may hereafter serve, for a period not less than fourteen days in the Army or Navy of the United States, either regular or volunteer, under the laws thereof, during the existence of an actual war, domestic or foreign, shall be deprived of the benefits of this chapter on account of not having attained the age of twenty-one years.

Sec. 2301. Nothing in this chapter shall be so construed as to prevent any person who shall hereafter avail himself of the benefits of section twenty-two hundred and eighty-nine from paying the mini-

mum price for the quantity of land so entered at any time after the expiration of fourteen calendar months from the date of such entry, and obtaining a patent therefor, upon making proof of settlement and of residence and cultivation for such period of fourteen months, and the provision of this section shall apply to lands on the ceded portion of the Sioux Reservation by act approved March second, eighteen hundred and eighty-nine, in South Dakota, but shall not relieve said settlers from any payments now required by law. (As amended by act Mar. 3, 1891.)

Sec. 2302. No distinction shall be made in the construction or execution of this chapter on account of race or color; nor shall any mineral lands be liable to entry and settlement under its provisions.

* * * * * * *

Sec. 2304. Every private soldier and officer who has served in the Army of the United States during the recent rebellion for ninety days, and who was honorably discharged and has remained loyal to the Government, including the troops mustered into the service of the United States by virtue of the third section of an act approved February thirteen, eighteen hundred and sixty-two, and every seaman, marine, and officer who has served in the Navy of the United States or in the Marine Corps during the rebellion for ninety days, and who was honorably discharged and has remained loyal to the Government, and every private soldier and officer who has served in the Army of the United States during the Spanish war, or who has served, is serving, or shall have served in the said Army during the suppression of the insurrection in the Philippines for ninety days, and who was or shall be honorably discharged; and every seaman, marine, and officer who has served in the Navy of the United States or in the Marine Corps during the Spanish war, or who has served, is serving, or shall have served in the said forces during the suppression of the insurrection in the Philippines for ninety days, and who was or shall be honorably discharged, shall, on compliance with the provisions of this chapter, as hereinafter modified, be entitled to enter upon and receive patents for a quantity of public lands not exceeding one hundred and sixty acres, or one quarter section, to be taken in compact form, according to legal subdivisions, including the alternate reserved sections of public lands along the line of any railroad or other public work not otherwise reserved or appropriated, and other lands subject to entry under the homestead laws of the United States; but such homestead settler shall be allowed six months after locating his homestead and filing his declaratory statement within which to make his entry and commence his settlement and improvement. (As amended by act Mar. 1, 1901.)

[fol. 377] Sec. 2305. The time which the homestead settler has served in the Army, Navy, or Marine Corps shall be deducted from the time heretofore required to perfect title, or if discharged on account of wounds received or disability incurred in the line of duty, then the term of enlistment shall be deducted from the time hereto-

fore required to perfect title, without reference to the length of time he may have served; but no patent shall issue to any homestead settler who has not resided upon, improved, and cultivated his homestead for a period of at least one year after he shall have commenced his improvements: Provided, That in every case in which a settler on the public land of the United States under the homestead laws died while actually engaged in the Army, Navy, or Marine Corps of the United States as private soldier, officer, seaman, or marine during the war with Spain or the Philippine insurrection, his widow, if unmarried, or in case of her death or marriage, then his minor orphan children or his or their legal representatives, may proceed forthwith to make final proof upon the land so held by the deceased soldier and settler, and that the death of such soldier while so engaged in the service of the United States shall, in the administration of the homestead laws, be construed to be equivalent to a performance of all requirements as to residence and cultivation for the full period of five years, and shall entitle his widow, if unmarried, or in case of her death or marriage, then his minor orphan children or his or their legal representatives, to make final proof upon and receive Government patent for said land; and that upon proof produced to the officers of the proper local land office by the widow, if unmarried, or in case of her death or marriage, then his minor orphan children or his or their legal representatives, that the applicant for patent is the widow, if unmarried, or in case of her death or marriage, his orphan children or his or their legal representatives, and that such soldier, sailor, or marine died while in the service of the United States as hereinbefore described, the patent for such land shall issue. (As amended by act Mar. 1, 1901.)

* * * * * * *

Sec. 2307. In case of the death of any person who would be entitled to a homestead under the provisions of section two thousand three hundred and four, his widow, if unmarried, or in case of her death or marriage, then his minor orphan children, by a guardian duly appointed and officially accredited at the Department of the Interior, shall be entitled to all the benefits enumerated in this chapter, subject to all the provisions as to settlement and improvement therein contained; but if such person died during his term of enlistment, the whole term of his enlistment shall be deducted from the time heretofore required to perfect the title.

* * * * * * *

Sec. 2309. Every soldier, sailor, marine officer, or other person coming within the provisions of section two thousand three hundred and four, may, as well by an agent as in person, enter upon such homestead by filing a declaratory statement, as in preemption cases; but such claimant in person shall within the time prescribed make his actual entry, commence settlements and improvements on the same, and thereafter fulfill the requirements of the law.

(No. 2)

Three Hundred and Twenty Acre Limitation

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

* * * * * * *

No person who shall, after the passage of this act, enter upon any of the public lands with a view to occupation, entry, or settlement under any of the land laws shall be permitted to acquire title to more than three hundred and twenty acres in the aggregate, under all of said laws, but this limitation shall not operate to curtail the right of any person who has heretofore made entry or settlement on the public lands, or whose occupation, entry, or settlement is validated by this act: Provided, That in all patents for lands hereafter taken up under any of the land laws of the United States or on entries or claims validated by this act, west of the one hundredth meridian, it shall be expressed that there is reserved from the lands in said patent described a right of way thereon for ditches or canals constructed by the authority of the United States.

Approved, August 30, 1890. (26 Stat., 391.)

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

* * * * * * *

Sec. 17. That reservoir sites located or selected and to be located and selected under the provisions of "An act making appropriations for sundry civil expenses of the Government for the fiscal year ending June thirtieth, eighteen hundred and eighty-nine, and for other purposes," and amendments thereto, shall be restricted to and shall contain only so much land as is actually necessary for the construction and maintenance of reservoirs, excluding so far as practicable lands occupied by actual settlers at the date of the location of said reservoirs; and that the provisions of "An act making appropriations for sundry civil expenses of the Government for the fiscal year ending June thirtieth, eighteen hundred and ninety-one, and for other purposes," which reads as follows, viz: "No person who shall after the passage of this act enter upon any of the public lands with a view to occupation, entry, or settlement under any of the land laws shall be permitted to acquire title to more than three hundred and twenty acres in the aggregate under all said laws," shall be construed to include in the maximum amount of lands the title to which is permitted to be acquired by one person only agricultural lands, and not include lands entered or sought to be entered under mineral-land laws.

Approved, March 3, 1891. (26 Stat., 1095.)

(No. 3)

Free Homestead Act

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That all settlers under the homestead laws of the United States upon the agricultural public lands, which have already been opened to settlement, acquired prior to the passage of this act by treaty or agreement from the [fol. 378] various Indian tribes, who have resided or shall hereafter reside upon the tract entered in good faith for the period required by existing law, shall be entitled to a patent for the land so entered upon the payment to the local land officers of the usual and customary fees, and no other or further charge of any kind whatsoever shall be required from such settler to entitle him to a patent for the land covered by his entry: Provided, That the right to commute any such entry and pay for said lands in the option of any such settler and in the time and at the prices now fixed by existing laws shall remain in full force and effect: Provided, however, That all sums of money so released which if not released would belong to any Indian tribe shall be paid to such Indian tribe by the United States, and that in the event that the proceeds of the annual sales of the public lands shall not be sufficient to meet the payments heretofore provided for agricultural colleges and experimental stations by an act of Congress, approved August thirtieth, eighteen hundred and ninety, for the more complete endowment and support of the colleges for the benefit of agriculture and mechanic arts, established under the provisions of an act of Congress, approved July second, eighteen hundred and sixty-two, such deficiency shall be paid by the United States: And provided further, That no lands shall be herein included on which the United States Government had made valuable improvements, or lands that have been sold at public auction by said Government.

Sec. 2. That all acts or part of acts inconsistent with the provisions of this act are hereby repealed.

Approved, May 17, 1900. (31 Stat., 179.)

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the provisions of section twenty-three hundred and one of the Revised Statutes of the United States, as amended, allowing homestead settlers to commute their homestead entries be, and the same hereby are, extended to all homestead settlers affected by or entitled to the benefits of the provisions of the act entitled "An act providing for free homesteads on the public lands for actual and bona fide settlers, and reserving the public lands for that purpose," approved the seventeenth day of May, anno Domini nineteen hundred: Provided, however, That in commuting such entries the entryman shall pay the price provided in the law under which original entry was made.

Approved, January 26, 1901. (31 Stat., 740.)

(No. 4)

Additional Homestead Entries

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

* * * * * * *

Sec. 6. That every person entitled, under the provisions of the homestead law, to enter a homestead, who has heretofore complied with or who shall hereafter comply with the conditions of said laws, and who shall have made his final proof thereunder for a quantity of land less than one hundred and sixty acres and received the receiver's final receipt therefor, shall be entitled under said laws to enter as personal right, and not assignable, by legal subdivisions of the public lands of the United States subject to homestead entry, so much additional land as added to the quantity previously so entered by him shall not exceed one hundred and sixty acres: Provided, That in no case shall patent issue for the land covered by such additional entry until the person making such additional entry shall have actually and in conformity with the homestead laws resided upon and cultivated the lands so additionally entered, and otherwise fully complied with such laws: Provided also, That this section shall not be construed as affecting any rights as to location of soldiers' certificates heretofore issued under section two thousand three hundred and six of the Revised Statutes.

Approved March 2, 1889. (25 Stat., 854.)

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

* * * * * * *

Sec. 2. That any homestead settler who has heretofore entered, or may hereafter enter, less than one-quarter section of land may enter other and additional land lying contiguous to the original entry which shall not, with the land first entered and occupied, exceed in the aggregate one hundred and sixty acres, without proof of residence upon and cultivation of the additional entry; and if final proof of settlement and cultivation has been made for the original entry when the additional entry is made, then the patent shall issue without further proof: Provided, That this section shall not apply to or for the benefit of any person who does not own and occupy the lands covered by the original entry: And provided, That if the original entry should fail for any reason prior to patent, or should appear to be illegal or fraudulent, the additional entry shall not be permitted, or, if having been initiated, shall be canceled.

Sec. 3. That commutation under the provisions of section twenty-three hundred and one of the Revised Statutes shall not be allowed of an entry made under this act.

Approved, April 28, 1904. (33 Stat., 527.)

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

* * * * * * *

Sec. 2. That any person who has heretofore made entry under the homestead laws and commuted same under provisions of section twenty-three hundred and one of the Revised Statutes of the United States and the amendments thereto, shall be entitled to the benefits of the homestead laws, as though such former entry had not been made, except that commutation under the provisions of section twenty-three hundred and one of the Revised Statutes shall not be allowed of an entry made under this section of this act.

Approved, June 5, 1900. (31 Stat., 267.)

[fol. 379] Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

* * * * * * *

Sec. 2. That any person who, prior to the passage of an act entitled "An act providing for free homesteads on the public lands for actual and bona fide settlers, and reserving the public lands for that purpose," approved May seventeenth, nineteen hundred, having made a homestead entry and perfected the same and acquired title to the land by final entry by having paid the price provided in the law opening the land to settlement, and who would have been entitled to the provisions of the act before cited had final entry not been made prior to the passage of said act, may make another homestead entry of not exceeding one hundred and sixty acres of any of the public lands in any State or Territory subject to homestead entry: Provided, That any person desiring to make another entry under this act will be required to make affidavit, to be transmitted with the other filing papers now required by law, giving the description of the tract former y entered, date and number of entry, and name of the land office where made, or other sufficient data to admit of readily identifying it on the official records: And provided further, That said person has all the other proper qualifications of a homestead entryman: And provided also, That commutation under section twenty-three hundred and one of the Revised Statutes or any amendment thereto, or any similar statute, shall not be permitted of an entry made under this act, excepting where the final proof, submitted on the former entry hereinbefore described, shows a residence upon the land covered thereby for the full period of five years or such term of residence thereon as added to any properly credited military or naval service shall equal such period of five years.

Approved, May 22, 1902. (32 Stat., 203.)

(No. 5)

Second Homestead Entries

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That any person who, prior to the approval of this act, has made entry under the homestead or desert-land laws, but who, subsequently to such entry, from any cause shall have lost, forfeited, or abandoned the same, shall be entitled to the benefits of the homestead or desert-land laws as though such former entry had not been made, and any person applying for a second homestead or desert-land entry under this act shall furnish a description and the date of his former entry: Provided, That the provisions of this act shall not apply to any person whose former entry was canceled for fraud, or who relinquished his former entry for a valuable consideration in excess of the filing fees paid by him on his original entry.

Approved, February 3, 1911. (Public—No. 340.)

(No. 6)

Rights of Settlers.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

* * * * * * *

Sec. 3. That any settler who has settled, or who shall hereafter settle, on any of the public lands of the United States, whether surveyed or unsurveyed, with the intention of claiming the same under the homestead laws, shall be allowed the same time to file his homestead application and perfect his original entry in the United States Land Office as is now allowed to settlers under the preemption laws to put their claims on record, and his right shall relate back to the date of settlement the same as if he settled under the preemption laws.

Approved, May 14, 1880. (21 Stat., 140.)

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

* * * * * * *

Sec. 2. That all commutations of homestead entries shall be allowed after the expiration of fourteen months from date of settlement.

Approved June 3, 1896. (29 Stat., 197.)

(No. 7)

Homestead Entry by Married Woman

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the third section of the act of Congress approved May fourteenth, eighteen hundred and eighty, entitled "An act for the relief of settlers on the public lands," be amended by adding thereto the following:

"Where an unmarried woman who has heretofore settled, or may hereafter settle, upon a tract of public land, improved, established, and maintained a bona fide residence thereon, with the intention of appropriating the same for a home, subject to the homestead law, and has married, or shall hereafter marry, before making entry of said land, or before making application to enter said land, she shall not, on account of her marriage, forfeit her right to make entry and receive patent for the land: Provided, That she does not abandon her residence on said land, and is otherwise qualified to make homestead entry: Provided further, That the man whom she marries is not, at the time of their marriage, claiming a separate tract of land under the homestead law.

"That this act shall be applicable to all unpatented lands claimed by such entrywoman at the date of passage."

Approved June 6, 1900. (31 Stat., 683.)

[fol. 380]

(No. 8)

Settlers Who Become Insane

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That in all cases in which parties who regularly initiated claims to public lands as settlers thereon, according to the provisions of the preemption or homestead laws, have become insane or shall hereafter become insane before the expiration of the time during which their residence, cultivation, or improvement of the land claimed by them is required by law to be continued in order to entitle them to make the proper proof and perfect their claims, it shall be lawful for the required proof and payment to be made for their benefit by any person who may be legally authorized to act for them during their disability, and thereupon their claims shall be confirmed and patented, provided it shall be shown by proof satisfactory to the Commissioner of the General Land Office that the parties complied in good faith with the legal requirements up to the time of their becoming insane, and the requirements in homestead entries of an affidavit of allegiance by the applicant in certain cases as a prerequisite to the issuing of the patents shall be dispensed with so far as regards such insane parties.

Approved, June 8, 1880. (21 Stat., 166.)

(No. 9)

Leaves of Absence

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

* * * * * * *

Sec. 3. That whenever it shall be made to appear to the register and receiver of any public-land office, under such regulations as the Secretary of the Interior may prescribe, that any settler upon the public domain under existing law is unable, by reason of a total or partial destruction or failure of crops, sickness, or other unavoidable casualty, to secure a support for himself, herself, or those dependent upon him or her upon the lands settled upon, then such register and receiver may grant to such a settler a leave of absence from the claim upon which he or she has filed for a period not exceeding one year at any one time, and such settler so granted leave of absence shall forfeit no rights by reason of such absence: Provided, That the time of such actual absence shall not be deducted from the actual residence required by law.

Approved March 2, 1889. (25 Stat., 854.)

(No. 10)

Final Proof Notice

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That before final proof shall be submitted by any person claiming to enter agricultural lands under the laws providing for preemption or homestead entries, such person shall file with the register of the proper land office a notice of his or her intention to make such proof, stating therein the description of lands to be entered, and the names of the witnesses by whom the necessary facts will be established. Upon the filing of such notice the register shall publish a notice, that such application has been made, once a week for the period of thirty days, in a newspaper to be by him designated as published nearest to such land, and he shall also post such notice in some conspicuous place in his office for the same period. Such notice shall contain the names of the witnesses as stated in the application. At the expiration of said period of thirty days the claimant shall be entitled to make proof in the manner heretofore provided by law. The Secretary of the Interior shall make all necessary rules for giving effect to the foregoing provisions.

Approved, March 3, 1879. (20 Stat., 472.)

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

* * * * * * *

Sec. 7. That the "act to provide additional regulations for homestead and preemption entries of public land," approved March third, eighteen hundred and seventy-nine, shall not be construed to forbid the taking of testimony for final proof within ten days following the day advertised as upon which such final proof shall be made, in cases where accident or unavoidable delays have prevented the applicant or witnesses from making such proof on the date specified.

Approved, March 2, 1889. (25 Stat., 854.)

(No. 11)

Penalties for Destroying Corner Monuments

United States Criminal Code—Chapter 4, Section 57

Sec. 57. Whoever shall willfully destroy, deface, change, or remove to another place any section corner, quarter-section corner, or meander post, on any Government line of survey, or shall wilfully cut down any witness tree or any tree blazed to mark the line of a Government survey, or shall wilfully deface, change, or remove any monument or bench mark of any Government survey, shall be fined not more than two hundred and fifty dollars, or imprisoned not more than six months or both.

Approved.

(No. 12)

Relinquishments

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That when a preemption, homestead, or timber-culture claimant shall file a written relinquishment of his claim in the local land office, the land covered by such claim shall be held as open to settlement and entry without further action on the part of the Commission of the General Land Office.

* * * * * * *

Approved, May 14, 1880. (21 Stat., 140.)

[fol. 381] (No. 13)

Instructions Concerning Absence by Officeholders from Their Homesteads

Department of the Interior,

General Land Office,

Washington, D. C., February 20, 1909.

Registers and Receivers, United States Land Offices.

GENTLEMEN: In the case of Ed Jenkins, decided by the department February 3, 1909, it was held that the absence of a person from his homestead entry on account of his duties as a public official can not be excused in the consideration of commutation proof.

Attention is called to circular of February 16, 1909, a copy of which is printed below.

In no case is official employment to be accepted as an excuse for absence from a homestead entry where commutation proof is offered. The making of commutation proof is to be governed by the provisions of the circular of October 18, 1907, a copy of which is also printed below.

Very respectfully, Fred Dennett, Commissioner.

Washington, D. C., February 16, 1909.

Registers and Receivers, United States Land Offices.

GENTLEMEN: For many years it has been the practice of the department to permit a homestead entryman who had established residence upon his claim and afterwards had been elected or appointed to a Federal, State, or county office, to be absent from his entry if required by his official duty, and to consider such absence constructive residence upon his claim. This ruling includes deputies and assistants in such offices. See 2 L. D., 147; 6 L. D., 668; 7 L. D., 88; 9 L. D., 523-525; 17 L. D., 195; 21 L. D., 155.

This privilege, which is not a stautory right but rests solely upon departmental rulings, has led to such grave abuse that the objects of the homestead law have been to a great extent defeated. Therefore, the department has decided to discontinue the said practice in so far as it has been applied to persons appointed to office, and limit it to persons elected to office. All decisions and instructions heretofore given, not in harmony with this view, are hereby overruled or modified in so far as they accredit such absence as residence to persons not elected to office.

It is not intended, however, to disturb the status of persons who have acted under the rule heretofore prevailing, nor to deny the benefit of the rule to persons who, prior to April 1, 1909, shall have been appointed to such office. Persons having homestead entries, who enter upon public service in nonelective positions to which they were

not appointed prior to the above date, will be required to comply fully with all of the provisions of the homestead law just as other settlers.

Very respectfully, Fred Dennett, Commissioner.

Approved: Frank Pierce, Acting Secretary.

(No. 14)

Commutation Proof

Washington, D. C., October 18, 1907.

Registers and Receivers, United States Land Offices.

GENTLEMEN: The following rules will govern your action upon homestead commutation proofs hereafter submitted, namely:

1. Commutation proof offered under a homestead entry made on or after November 1, 1907, will be rejected unless it be shown thereby that the entryman has, in good faith, actually resided upon and cultivated the land embraced in such entry for the full period of at least 14 months.

2. Where such commutation proof is offered under an entry made prior to November 1, 1907, if it be satisfactorily shown thereby that the entryman had, in good faith, established actual residence on the land within six months from the date of his entry, he may be credited with constructive residence from date of entry: Provided, That it be also shown that such residence was, in good faith, maintained for such period as, when added to the period of constructive residence herein recognized, equals the full period of 14 months' residence required by the homestead laws; and

3. In no case can commutation proof be accepted when it fails to show that the required residence and cultivation continued to the date on which application for notice of intention to make such proof was filed.

Very respectfully, R. A. Ballinger, Commissioner.

Approved. James Rudolph Garfield, Secretary.

(No. 15)

Enlarged Homesteads

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That any person who is a qualified entryman under the homestead laws of the United States may enter, by legal subdivisions, under the provisions of this act, in the State of Colorado, Montana, Nevada, Oregon, Utah, Washington, and Wyoming, and the Territories of Arizona and New Mexico, three hundred and twenty acres, or less, of nonmineral, nonirrigable, unreserved and unappropriated surveyed public lands

which do not contain merchantable timber, located in a reasonably compact body, and not over one and one-half miles in extreme length: Provided, That no lands shall be subject to entry under the provisions of this act until such lands shall have been designated by the Secretary of the Interior as not being, in his opinion, susceptible of successful irrigation at a reasonable cost from any known source of water supply.

Sec. 2. That any person applying to enter land under the provisions of this act shall make and subscribe before the proper officer an affidavit as required by section twenty-two hundred and ninety of [fol. 382] the Revised Statutes, and in addition thereto shall make affidavit that the land sought to be entered is of the character described in section one of this act, and shall pay the fees now required to be paid under the homestead laws.

Sec. 3. That any homestead entryman of lands of the character herein described, upon which final proof has not been made, shall have the right to enter public lands, subject to the provisions of this act, contiguous to his former entry which shall not, together with the original entry, exceed three hundred and twenty acres, and residence upon and cultivation of the original entry shall be deemed as residence upon and cultivation of the additional entry.

Sec. 4. That at the time of making final proofs as provided in section twenty-two hundred and ninety-one of the Revised Statutes the entryman under this act shall, in addition to the proofs and affidavits required under the said section, prove by two credible witnesses that at least one-eighth of the area embraced in his entry was continuously cultivated to agricultural crops other than native grasses beginning with the second year of the entry, and that at least one-fourth of the area embraced in the entry was so continuously cultivated beginning with the third year of the entry.

Sec. 5. That nothing herein contained shall be held to affect the right of a qualified entryman to make homestead entry in the States named in section one of this act under the provisions of section twenty-two hundred and eighty-nine of the Revised Statutes, but no person who has made entry under this act shall be entitled to make homestead entry under the provisions of said section, and no entry made under this act shall be commuted.

Sec. 6. That whenever the Secretary of the Interior shall find that any tracts of land, in the State of Utah, subject to entry under this act, do not have upon them such a sufficient supply of water suitable for domestic purposes as would make continuous residence upon the lands possible, he may, in his discretion, designate such tracts of land, not to exceed in the aggregate two million acres, and thereafter they shall be subject to entry under this act without the necessity of residence: Provided, That in such event the entryman on any such entry shall in good faith cultivate not less than one-eighth of the entire area of the entry during the second year, one-fourth during the third year, and one-half during the fourth and fifth years after the date of such

entry, and that after entry and until final proof the entryman shall reside within such distance of said land as will enable him successfully to farm the same as required by this section.

Approved, February 19, 1909. (35 Stat., 639.)

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That any person who is a qualified entryman under the homestead laws of the United States may enter, by legal subdivision, under the provisions of this act, in the State of Idaho, three hundred and twenty acres or less of arid non-mineral, nonirrigable, unreserved, and unappropriated surveyed public lands which do not contain merchantable timber, located in a reasonably compact body and not over one and one-half miles in extreme length: Provided, That no lands shall be subject to entry under the provisions of this act until the lands have been designated by the Secretary of the Interior as not being in his opinion, susceptible of successful irrigation, at a reasonable cost, from any known source of water supply.

(Sections 2, 3, 4 and 5 of this act are in the exact language of corresponding sections of the act of Feb. 19, 1909, supra.)

Sec. 6. That whenever the Secretary of the Interior shall find that any tracts of land in the State of Idaho subject to entry under this act do not have upon them such a sufficient supply of water suitable for domestic purposes as would make continuous residence upon the lands possible, he may, in his discretion, designate such tracts of land, not to exceed in the aggregate three hundred and twenty thousand acres, and thereafter they shall be subject to entry under this act without the necessity of residence upon the land entered: Provided, That the entryman shall in good faith cultivate not less than one-eighth of the entire area of the entry during the second year, one-fourth during the third year, and one-half during the fourth and fifth years after the date of said entry, and that after six months from date of entry and until final proof the entryman shall reside not more than twenty miles from said land and be engaged personally in preparing the soil for seed, seeding, cultivating, and harvesting crops upon the land during the usual seasons for such work unless prevented by sickness or other unavoidable cause. Leave of absence from a residence established under this section may, however, be granted upon the same terms and conditions as are required of other homestead entrymen.

Approved, June 17, 1910. (36 Stat., 531.)

[fol. 383] PLAINTIFFS' EXHIBIT M—Filed November 30, 1920

"B." JEP.

4-207

Department of the Interior,

General Land Office

Washington, D. C., July 16th, 1920.

I hereby certify that the annexed copy of office letter "R" to R. & R. Seattle, dated December 27, 1902, copy of letter "R" to R. & R. Seattle, dated September 23, 1904, copy of letter "L" to R. & R. Seattle, dated January 29, 1907 and copy of letter "L" to R. & R. Seattle, dated February 16, 1907 are true and literal exemplifications from the press copies of the said letters on file in this office.

In testimony whereof I have hereunto subscribed my name and caused the seal of this office to be affixed, at the City of Washington, on the day and year above written.

C. M. Bruce, Assistant Commissioner of the General Land Office. (Seal of U. S. G. L. O.)

No. 13911. Filed in Whatcom County, Wash., Jul. 31, 1920. Geo. M. Cook, County Clerk, by G. P. Kincaid, Deputy Clerk.

[fol. 384] 1902-209,022

"R." M. J. McV.

Address only the Commissioner of the General Land Office.

Department of the Interior,

General Land Office

Washington, D. C., December 27, 1902.

Register and Receiver, Seattle, Washington.

GENTLEMEN: By order of the department dated December 18, 1902, there are hereby temporarily withdrawn from settlement, entry, sale or other disposal, all the vacant, unappropriated public lands within the following described boundaries, pending determination as to the advisability of including such lands within the Washington Forest Reserves:

Tract 1. Beginning at the southwest corner of Township forty (40) North Range six (6) East, Willamette Meridian, Washington: thence easterly to the southeast corner of said township; thence southerly along the unsurveyed range line to the point for the southeast corner of section twenty-four (24), Township thirty-seven (37)

North, Range Six (6) East; thence westerly to the southwest corner of section twenty-two (22), said township; thence northerly to the northwest corner of section three (3), said township; thence westerly to the south-east corner of township thirty-eight (38) North, Range five (5) East; thence northerly to the southeast corner of section thirteen (13), said township; thence westerly to the southwest corner [fol. 385] of said section; thence northerly along the section lines, allowing for the proper offset on the township line between townships thirty-eight (38) and thirty-nine (39) North, to the southwest corner of section twelve (12), Township thirty-nine (39) North, Range Five (5) East; thence easterly to the southeast corner of said section; thence northerly to the southwest corner of Township forty (40) North, Range six (6) East, the place of beginning.

Tract 2.—Beginning at the northwest corner of Township thirty-six (36) North, Range Seven (7) East, Willamette Meridian, Washington; thence easterly along the Ninth (9th) Standard Parallel North to the point for the northeast corner of section five (5), Township thirty-six (36) North Range Eight (8) East; thence southerly to the southeast corner of section twenty (20), said township; thence westerly along the section lines to the southwest corner of section nineteen (19), Township thirty-six (36) North Range seven (7) East; thence northerly to the northwest corner of said township, the place of beginning.

Tract 3.—Beginning at the northwest corner of Township thirty-six (36) North, Range Nine (9) East, Willamette Meridian, Washington; thence easterly along the surveyed and unsurveyed Ninth (9th) Standard Parallel North to the northeast corner of Township Thirty-six (36) North, Range Eleven (11) East; thence southerly along the surveyed and unsurveyed range line to the point for the [fol. 386] intersection with the Eighth (8th) Standard Parallel North; thence westerly to the southeast corner of Township thirty-three (33) North, Range Ten (10) East; thence northerly along the surveyed and unsurveyed range line to the northwest corner of township thirty-five (35) North, Range Eleven (11) East; thence westerly along the surveyed and unsurveyed township line to the southwest corner of township thirty-six (36) North, Range Nine (9) East; thence northerly to the northwest corner of the said township, the place of beginning.

Tract 4.—Beginning at the northeast corner of section four (4), Township thirty-four (34) North Range Five (5) East, Willamette Meridian, Washington; thence easterly to the southeast corner of Township thirty-five (35) North, Range six (6) East; thence northerly to the southwest corner of section nineteen (19), Township thirty-five (35) North, Range seven (7) East; thence easterly along the section lines to the southeast corner of section twenty-four (24) Township thirty-five (35) North, Range Eight (8) East; thence southerly to the point for the southwest corner of section eighteen (18), Township thirty-four (34) North, Range nine (9) east; thence easterly to the northeast corner of section twenty-three (23)

said township; thence southerly to the southeast corner of section thirty-five (35), said township; thence easterly to the southeast corner of said township; thence southerly to the southwest corner of Township thirty-three (33), North, Range ten (10) East; thence [fol. 387] westerly along the Eighth (8th) Standard Parallel North to the southeast corner of Township thirty-three (33) North, Range Seven (7) East; thence northerly to the northeast corner of said township; thence westerly to the southeast corner of section thirty-three (33), township thirty-four (34) North, Range Five (5) East; thence northerly to the northeast corner of section four (4) said township, the place of beginning.

This temporary withdrawal does not affect any bona fide settlement or valid claim upon the lands which was initiated prior to the date hereof and is duly of record within the statutory period.

You will make the proper notations of this withdrawal upon the records of your office.

Very respectfully, Bruge Hermann, Commissioner.

L. E. M.

[fol. 388] "2." 1904-165,724

Department of the Interior,

General Land Office,

Washington, D. C.

September 23, 1904

Proposed Additions to the Washington Forest Reserve, Washington. Restoration of Part of Withdrawn Lands

Register and Receiver, Seattle, Washingon.

GENTLEMEN: By order of September 20, 1904, the acting Secretary of the Interior released the following described public lands from the temporary withdrawals made on December 27, 1903, and February 26, 1904, for proposed additions to the Washington Forest Reserve, and restored said lands to settlement, but provided that the lands so released from withdrawal and restored to settlement shall not be subject to entry, filing or selection under the public land laws until after ninety days notice by such publication as this office may prescribe:

In Township thirty-four (34) North, Range five (5) East, sections One (1), two (2) and Three (3), Sections ten (10) to fifteen (15), both inclusive, twenty-two (22) to twenty-seven (27) both inclusive, and sections thirty-four (34) thirty-five (35) and thirty-six (36).

[fol. 389] In Township thirty-eight (38) North, Range five (5) east; sections one (1), twelve (12) and thirteen (13);

In Township thirty-nine (39) North, Range five (5) East, sections thirteen (13), twenty-four (24), twenty-five (25) and thirty-six (36);

All township thirty-four (34), North Range six (6) East;

In Township thirty-seven (37) North, Range six (6) East, the west half of sections three (3) and ten (10), and all sections fifteen (15) and twenty-two (22);

In township thirty-eight (38) North, Range six (6) East, sections two (2) to eleven (11), both inclusive, and sections fourteen (14) to thirty-four (34) both inclusive;

In township thirty-nine (39) North, Range six (6) East, Sections one (1) to twenty-two (22), both inclusive, and sections twenty-seven (27) to thirty-five (35), both inclusive;

In Township thirty-four (34) North Range seven (7) East, Sections thirty (30), thirty-one (31), thirty-five (35) and thirty-six (36);

In Township thirty-five (35) North Range seven (7) East, Sections twenty-five (25) and twenty-six (26), the north half and south-east quarter of section twenty-seven (27), the north half of section twenty-eight (28), the northeast quarter of section twenty-nine (29), the north half of section thirty-five (35) and all section thirty-six (36);

In township thirty-six (36) North, Range Seven (7) East, [fol. 390] Section six (6) and seven (7), the southwest quarter of Section eight (8) and all sections ten (10) to twenty-four (24) both inclusive;

In township thirty-four (34) North, Range eight (8) East, section one (1);

In Township thirty-five (35) North, Range eight (8) East, sections twenty-five (25) to thirty-six (36), both inclusive;

In Township thirty-six (36) North, Range eight (8) East, the south half of section six (6), all sections seven (7), eight (8), seventeen (17), eighteen (18), Nineteen (19) and twenty (20);

In Township thirty-three (33) North, Range nine (9) East, the southeast quarter of section twenty-two (22), the south half of the northeast quarter of section twenty-four (24), all sections twenty-five (25), twenty-seven (27) and thirty-four (34), the southwest quarter of section thirty-five (35) and all Section thirty-six (36);

In Township thirty-four (34) North, Range nine (9) East, Sections twenty-three (23), twenty-six (26) and thirty-five (35);

In Township thirty-six (36) North, Range nine (9) East, the northwest quarter of section five (5), all sections six (6) and seven (7); the southeast quarter of section eight (8), all section nine (9), the west half and northeast quarter of section ten (10), the northwest quarter of section eleven (11), all Sections sixteen (16) to twenty (20) both inclusive, sections twenty-five (25), twenty-six [fol. 391] (26), twenty-nine (29), thirty (30), and thirty-one (31), the west half of section thirty-two (32) and all sections thirty-four (34), thirty-five (35) and thirty-six (36);

In Township thirty-five (35) North, Range ten (10) East, the west half of section seventeen (17);

In Township thirty-three (33) North, Range eleven (11) East, the southwest quarter of section eighteen (18), the west half of Section Nineteen (19), the southeast quarter, the southwest quarter of

the northeast quarter and the west half of Section thirty (30); all section thirty-one (31) and the west half of Section thirty-two (32);

In township thirty-five (35) North, Range eleven (11) East, section five (5) to thirty-six (36), both inclusive;

In township thirty-six (36) North, Range eleven (11) East, the east half and southwest quarter of section one (1), the south half of section two (2), the southeast quarter of section ten (10), the west half and northeast quarter of section eleven (11), all Section fifteen (15), the south half of Section twenty (20), the south half and the northeast quarter of section twenty-one (21), the west half of Section twenty-two (22), the north half of Section twenty-eight (28); all Section twenty-nine (29), the east half of Section thirty (30), all section thirty-one (31) and the west half of section thirty-two (32);

All of the Willamette Meridian, Washington.

[fol. 392] Immediately post upon your records the fact that said lands were released from withdrawal and restored to settlement on September 20, 1904.

You will be fully instructed at an early date regarding the required publication of the date upon which the lands will become subject to entry, filing and selection.

Acknowledge receipt hereof immediately by wire.

Very respectfully, W. H. Richards, Commissioner.

[fol. 393] "I." 1907-F. S. H.

Address only the Commissioner of the General Land Office.

Department of the Interior,

General Land Office,

Washington, D. C.

January 29, 1907.

Proposed Addition, Washington Forest Reserve, Washington.
Temporary Withdrawal.

Register and Receiver, Seattle, Washington.

GENTLEMEN: On January 25, 1907, the Secretary of the Interior withdrew the vacant unappropriated public lands in the areas described below from all forms of disposal under the public land laws, except the mineral laws, as a proposed addition to the Washington Forest Reserve, Washington:

In T. 39 N. R. 5 E., Secs. 13, 24, 25 and 36;

In T. 38 N. R. 6 E., Secs. 24 and 25, and E. ½ of Sec. 26;

In T. 39 N. R. 6 E., Secs. 3 to 10, both inclusive, Secs. 14 to 22, both inclusive, Secs. 27 to 35, both inclusive.

North and East of the Willamette Meridian.

From the force and effect of this withdrawal all lands are excepted which at the date thereof are embraced in any legal entry or covered by any lawful filing or selection duly of record in the proper United States Land Office, or upon which any valid settlement has been made pursuant to law, and the statutory period within which to make entry or filing of record has not expired; and also excepting [fol. 394] all lands which are at said date embraced within any withdrawal or reservation for any use or purpose to which this withdrawal is inconsistent; Provided, that these exceptions shall not continue to apply to any particular tract of land unless the entryman, settler, or claimant continues to comply with the law under which the entry, filing or settlement was made, or unless the reservation or withdrawal to which this withdrawal is inconsistent continues in force; not excepting from the force and effect of this withdrawal, however, any land within the boundaries herein described, which has been withdrawn to protect the coal therein, but this withdrawal does not vacate any such coal land withdrawal; and provided that these exceptions shall not validate any selection, entry, or filing which has been allowed or permitted to remain of record subject to the creation of a permanent reservation.

You will make the proper notations of said withdrawal upon the records of your office.

Very respectfully, W. H. Richards, Commissioner.

F. S. H.

[fol. 395] "L."

Address only the Commissioner of the General Land Office.

Department of the Interior,
General Land Office,
Washington, D. C.

February 16, 1907.

Washington Forest Reserve, Washington. Restoration.

Register and Receiver, Seattle, Washington.

GENTLEMEN: Confirming my telegram of February 11, 1907, you are advised that the Secretary of the Interior revoked his order of January 25, 1907, withdrawing the land described below in the Washington Forest Reserve, Washington, and restored the same to immediate settlement and entry, publication being dispensed with:

In T. 39 N., R. 5 E., Secs. 13, 24, 25, 36;
In T. 38 N., R. 6 E., Secs. 24, 25, E. ½ Sec. 26;
In T. 39 N., R. 6 E., Secs. 3 to 10, both inclusive, Secs. 14 to 22, both inclusive, Secs. 27 to 35, both inclusive:
North and East, Boise Meridian.

You will make proper notations of this withdrawal upon the records of your office.

Very respectfully W. H. Richards, Commissioner.

EHC

[File endorsement omitted.]

[fol. 396] DEFENDANTS' EXHIBIT No. 1—Filed June 24, 1920

No. 120,135

The United States of America

to

Great Northern Railway Company

Patent

The United States of America to all to whom these presents shall come, Greeting:

Whereas, under rulings of the General Land Office the extension into Dakota Territory, now the States of North Dakota and South Dakota, of the limits of the grants of lands made by Congress to aid in the construction of the several lines of railroad now owned by the Saint Paul, Minneapolis and Manitoba Railway Company, was denied and in consequence of said rulings, lands within the limits of said grants in said States have been claimed, settled upon, occupied and improved by numerous person- in good faith, under color of title or of right to do so, derived from the various laws of the United States relating to the public domain and are now claimed by them, their heirs or assigns; and whereas, under recent construction of said grants, the said occupants, improvers, or purchasers were liable to be evicted from their holdings; and, Whereas, by Act of Congress approved August 5, 1892, (27 Statutes, 390) the Secretary of the Interior was directed to cause to be prepared and delivered to said railway company a list of the tracts which had been purchased, claimed, occupied and improved as set forth therein and provided that after the receipt of said list the railway company shall execute under its corporate seal and deliver to the Secretary of the Interior a deed of conveyance releasing said lands to the United States, and should procure, and cause to be released to the United States all claims and liens thereon derived through it; and

Whereas, said Company upon the execution and procurement of [fol. 397] the release aforesaid was authorized to select "an equal quantity of non-mineral public lands, so classified as non-mineral at the time of the Actual Government survey, which has been or shall be made, of the United States not reserved and to which no adverse right or claim shall have attached or have been initiated at the time of the making of such selection lying within any State into

or through which the railway owned by said railway company runs," but not including any lands within the limits of the grant to aid in the construction of the Saint Vincent Branch of the road as located under the act of March 3, 1871, upon which any person had, in good faith, settled and made or acquired valuable improvements prior to March, eighteen hundred and seventy-seven; and

Whereas, There has been filed in and accepted by the Department of the Interior evidence showing that the Great Northern Railway Company is the lawful successor in interest of the Saint Paul, Minneapolis and Manitoba Railway Company, and entitled to receive patent for all lands earned by the latter Company, the ultimate title to which remains in the United States, and Whereas; the following described lands have been selected by the duly authorized agent of the company, under the act of August 5, 1892, and the lands given as the bases thereof have been duly released and conveyed to the United States in conformity with the requirements of said act, viz:

Willamette Meridian, Washington

Township thirty-nine North, Range Five East

The southeast quarter of section twenty-four, containing one hundred sixty acres;

Township Thirty-four North, Range Six East

The Lot twelve of Section three, containing forty acres; and the Lots nine, ten and eleven of Section four, containing one hundred and twenty acres;

[fol. 398] Township Thirty-eight North, Range Six East

The east half of the northeast quarter, the south half of the southeast quarter, the northwest quarter of the southeast quarter and the northeast quarter of the southwest quarter of Section ten, containing two hundred forty acres; the northeast quarter of the southwest quarter of Section seventeen, containing forty acres; the southeast quarter of the northeast quarter and the east half of the southeast quarter of Section eighteen, containing one hundred twenty acres; the northeast quarter of the southeast quarter of Section twenty-four containing forty acres; and the northwest quarter of the southeast quarter of Section thirty, containing forty acres.

Township Thirty-nine North, Range Six East

The southwest quarter of the northwest quarter of Section two, containing forty acres; the Lot one and the southwest quarter of the northwest quarter of Section three, containing eighty-seven and sixty-seven hundredths acres; the Lot One, the southeast quarter

of the northeast quarter, and the northeast quarter of the southeast quarter of Section four, containing one hundred thirty and eighty hundredths acres; and the southeast quarter of the southwest quarter of Section thirty-five, containing forty acres, and containing in the aggregate one thousand ninety-eight and forty-seven hundredths acres.

Now know ye, That the United States of America, in consideration of the premises, and pursuant to the said Act of Congress, have given and granted, and by these presents do give and grant, unto the Great Northern Railway Company, successor in interest to the Saint Paul, Minneapolis and Manitoba Railway Company, and its assigns the tracts of land selected as aforesaid and described in the foregoing;

To have and to hold the said tracts with the appurtenances thereof unto the Great Northern Railway Company, successor as aforesaid, and to its successors and assigns, forever.

[fol. 399] In testimony whereof, I, Theodore Roosevelt, President of the United States of America, have caused these letters to be made Patent, and the seal of the General Land Office to be hereunto affixed.

Given under my hand, at the City of Washington, the thirteenth day of April, in the year of our Lord one thousand nine hundred and eight, and of the Independence of the United States the one hundred and thirty-second.

By the President.

Theodore Roosevelt, by M. W. Young, Secretary.

Recorded Vol. 37, Page 189 to 190.
H. W. Sanford, Recorder of the General Land Office. (Seal United States General Land Office.)

Received for record at 10:50 A. M., May 18, A. D. 1908, and recorded at the request of Chas. H. Babcock.
J. A. Miller, County Auditor of Whatcom County, State of Washington, by L. E. King, Deputy.

Compared. LEK. E. S.
Rec. Vol. 3, Patents, Page 64.

[fol. 400] STATE OF WASHINGTON,
County of Whatcom, ss:

I, J. A. Miller, County Auditor and Ex-officio Recorder of Deeds in and for Whatcom County, State of Washington, hereby certify that the annexed and foregoing is a true and correct copy of patent from the United States of America, to Great Northern Railway Co. #120135 as the said appears of Record, on Page 64 of Volume 3 of patent Records of said County.

Witness my hand and official seal this 22 day of June, A. D. 1920. J. A. Miller, County Auditor in and for Whatcom County, State of Washington, by J. Wayland Clark, Deputy. (Seal of Auditor Whatcom County.)

(Here follows Defendants' Exhibit No. 2, marked side folio page 401.)

[fols. 402-405] [File endorsement omitted.]

Defendants' Exhibit No. 3

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

No. 74

CHARLES W. REED and DORA REED, His Wife, Plaintiffs,

vs.

ST. PAUL, MINNEAPOLIS & MANITOBA RAILWAY COMPANY, a Corporation, and GREAT NORTHERN RAILWAY, COMPANY, a Corporation, Defendants

COMPLAINT—Filed October 8, 1915; omitted; printed side page 33 ante

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[fol. 406] UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON

[Title omitted]

APPEARANCE—Filed October 8, 1915

To the clerk of the above-entitled court:

You will please enter our appearance as attorneys for plaintiff in the above entitled cause, and service of all subsequent papers, except writs and process, may be made upon said —— —— by leaving the same with

Carl E. Croson or E. H. Flick, Office Address 900 Leary Bldg., Seattle, Wash.

NOTICE.—Attorneys will please endorse their own filings. Rule 11.

[File endorsement omitted.]

MAP

TOO

LARGE

FOR

FILMING

[fol. 407] UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON

[Title omitted.]

PRÆCIPE—Filed Oct. 8, 1915

To the clerk of the above-entitled court:

You will please issue subpœna for defendants in above cause.

Carl E. Croson.

NOTICE.—Attorneys will please endorse their own filings—Rule 11.

[fol. 408] UNITED STATES OF AMERICA

IN THE DISTRICT COURT FOR WESTERN DISTRICT OF WASHINGTON

In Equity. No. 74

SUBPŒNA—Filed October 11, 1915

The President of the United States of America to St. Paul, Minneapolis & Manitoba Railway Company, a corporation, and Great Northern Railway Company, a corporation, GREETING:

You are hereby commanded, that you be and appear in said District Court of the United States aforesaid, at the Court Room of said Court in the City of Seattle on the 8th day of October, 1915, to answer a Bill of Complaint filed against you in said Court by Charles W. Reed and Dora Reed, his wife, and to do and receive what the Court shall have considered in that behalf. And this you are not to omit under the penalty of the law.

Witness the Honorable Jeremiah Neterer, Judge of said Court, and the seal thereof, at Washington, this 8th day of October, 1915.

Frank L. Crosby, Clerk, by Ed. M. Lakin, Deputy Clerk.

(Seal of U. S. Dist. Court.)

Memorandum Pursuant to Rule 12, Supreme Court U. S.

You are hereby required to enter your appearance in the above mentioned suit on or before twenty days from the date of service, exclusive of the day thereof, at the Clerk's office of said Court, pursuant to said Bill; otherwise the said Bill will be taken pro confesso.

Frank L. Crosby, Clerk, by Ed. M. Lakin, Deputy Clerk.

(Seal of U. S. Dist. Court.)

[fol. 409] MARSHALL'S RETURN

UNITED STATES OF AMERICA,
Western District of Washington, ss:

I hereby certify, that I have served the within writ by delivering to and leaving two true copies with T. J. Moore, City Passenger & Ticket Agt. Great Northern Railway Company, incorporated, for each of the two defendants herein.

John M. Boyle, United States Marshal, by Donald D. Fuller, Deputy. (Seal U. S. Dist. Court.)

Oct. 9, 1915.
Fees: $4.12.

[fol. 410] IN THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON

[Title omitted.]

DEMURRER OF GREAT NORTHERN RAILWAY COMPANY—Filed October 29, 1915

The demurrer of the Great Northern Railway Company, a corporation, one of the defendants above named, to the bill of complaint. This defendant by protestation, not confessing or acknowledging all or any of the matters and things in the said plaintiffs' bill of complaint to be true, in such manner and form as the same are therein set forth and alleged, and says that the same does not state any matter of equity entitling the plaintiffs to the relief prayed for, nor are the facts as stated sufficient to entitle plaintiffs, or either of them, to any relief as against this defendant, and for cause of demurrer shows that the legal title to the property described in said bill of complaint is in the United States of America and fails to show that any patent for said property has been issued by the United States to any person or corporation whatsoever; and because said bill further fails to show that the plaintiffs were deprived of their alleged homestead right under the laws of the United States by an erroneous decision of the Land Department of the United States; and because it further appears from said bill of complaint that the plaintiff Dora Reed is the wife of plaintiff Charles W. Reed and is living with her husband, and is therefore not entitled to enter land under the Homestead laws of the United States.

[fol. 411] Wherefore, and for divers other good causes of demurrer appearing in said bill, this defendant demurs thereto and humbly demands the judgment of this court whether it shall be compelled to make any further or other answer to the said bill, and prays to be hence dismissed with its costs and charges in this behalf most wrongfully sustained.

F. V. Brown, F. G. Dorety, Solicitor for Defendant Great Northern Railway Company.

Jurat showing the foregoing was duly sworn to by F. G. Dorety omitted in printing.

[fol. 412] IN THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

[Title omitted]

ANSWER AND DISCLAIMER OF ST. PAUL, MINNEAPOLIS AND MANITOBA RAILWAY COMPANY—Filed Oct. 29, 1915

The Answer and Disclaimer of the St. Paul, Minneapolis & Manitoba Railway Company, One of the Above-named Defendants, to the Bill of Complaint of the Above-named Plaintiffs.

Said defendant has not and does not claim, and at the time of the commencement of this action had not and did not claim to have, any right, or interest in any of the matters in question in this suit, and it disclaims all right, title and interest legal and equitable in any of the said matters; that this defendant was not applied to by the plaintiff for a disclaimer prior to the filing of the bill, and said defendant says that if it had been applied to by the plaintiffs before the filing of their bill it would have disclaimed all such right, title and interest; and said defendant submits that said bill should be dismissed as against it with costs.

St. Paul, Minneapolis & Manitoba Railway Company, by F. G. Dorety, Its Solicitor. F. V. Brown, F. G. Dorety, Solicitors for St. Paul, Minneapolis & Manitoba Railway Company.

[fol. 413] Jurat showing the foregoing was duly sworn to by F. G. Dorety omitted in printing.

[fol. 414] UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON

[Title omitted]

APPEARANCE—Filed Oct. 29, 1915

To the Clerk of the above-entitled court:

You will please enter my appearance as attorney for defendant in the above entitled cause, and service of all subsequent papers, except writs and process, may be made upon said defendant, by leaving the same with

F. V. Brown and F. G. Dorety, Office Address 302 King St., Pass. Agt., Seattle, Wash.

NOTICE.—Attorneys will please endorse their own filings. Rule 11.

[fol. 415] IN THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON

[Title omitted]

POINTS AND AUTHORITIES IN SUPPORT OF DEMURRER OF GREAT NORTHERN RAILWAY COMPANY TO COMPLAINT—Filed November 1, 1915

The complaint alleges that the plaintiff settled upon the land in question under the homestead laws of the United States, implying that the land is the property of the United States. It nowhere alleges that the patent of the United States has been issued. The necessary inference is that Reed's claim of homestead is pending and undetermined in the Land Department of the United States.

A suit to quiet title or to have a defendant decreed to hold the title in trust for plaintiff will not lie so long as the title to the land is in the United States. Neither can the courts, either Federal or State, render a decree which will make void the patent of the United States when issued.

Marquez v. Frisbie, 101 U. S. 473.
U. S. vs. Schurz, 102 U. S. 378.
Cosmos Exploration Co. v. Gray Eagle Oil Co., 190 U. S. 301.
Rockfinger vs. Foster, 190 U. S. 116.
Humbird vs. Avery, 195 U. S. 480.
(See also authority cited 32 Cyc. 1026, Subdivision 16, Note 82.)

If it should appear in this case that the patent has in fact been issued and that this is a suit to enforce a constructive trust, still, the bill is demurrable in that it fails to show that the plaintiffs were deprived of their homestead right by an erroneous decision of the Land Department of the United States.

Gonzales vs. French, 164 U. S. 338.
Durango etc. Co. v. Evans, 80 Fed. 425.

Statutes of Limitation and adverse possession under the laws of the state cannot operate so long as the legal title remains in the [fol. 416] United States.

Gibson v. Choteau, 13 Wallace, 92.
Redfield vs. Park, 130 U. S. 623.

The title of the complaint states that the plaintiff Dora Reed is the wife of the plaintiff Charles W. Reed, and the complaint alleges that they are a marital community. A married woman living with her husband is not qualified to enter land under the Homestead Revised Statutes.

Section 2289 Revised Statutes.

The community interest of the wife under the laws of the State of Washington cannot attach to lands held by the husband under

the Homestead Laws of the United States until he has made his homestead proofs and perfected his homestead entry.

McCune vs. Essig, 199 U. S. 382.
Wadkins vs. Producers Oil Co., 227 U. S. 368.

F. V. Brown, F. G. Dorety, Attorneys for Defendant Great Northern Railway Company.

[fol. 417] UNITED STATES DISTRICT COURT, WESTERN DISTRICT OF WASHINGTON

[Title omitted]

OPINION ON DEMURRER—Filed November 23, 1915

Carl E. Croson, Seattle, Washington; E. H. Flick, Seattle, Washington, for plaintiffs.
F. G. Brown, Seattle, Washington; F. G. Dorety, Seattle, Washington, for defendants.

NETERER, Judge:

The plaintiffs allege, in substance, that they are a marital community, and as such in good faith settled upon public lands upon homestead entry under the provisions of the act of Congress of May 14, 1880, on November 24, 1906; that on February 6, 1907, Charles W. Reed made application for homestead entry; that during the summer of 1901, J. J. Tincker, a qualified entryman under the Act of Congress, supra, had settled upon the land, and, during the years 1902 and 1903 he posted notices giving a description of the land, advising the public that he claimed the land under the homestead laws of the United States; that on April 1, 1902, he commenced to erect a cabin, and asserted rights to the land until August 21, 1906, at which time he conveyed his right in the land to W. M. Smithey, and "notices of claim under the scrip land laws of the United States, or otherwise, were never posted on said land up to said time last mention;" that W. M. Smithey was a qualified entryman during all the time he held such land; and that on the 24th day of November, 1906, sold his claim to the land to the plaintiffs; that the land was not surveyed until July, 1905, and survey was not [fol. 418] accepted by the Land Department until November 27, 1906. It is then alleged that plaintiffs have at all times mentioned claimed said land and occupied and improved the same; that plaintiffs and their predecessors in interest have held said land more than ten years openly and notoriously "with adverse interest to the world at large;" and then states that the defendants claim some right to the land, but that the claim is junior to plaintiffs', and pray judgment quieting title in plaintiffs.

It is alleged that the defendants are each a corporation organized under the laws of Minnesota.

A disclaimer has been filed by the St. Paul, Minneapolis & Manitoba Railway Company, and a demurrer is presented by the Great Northern Railway Company on the ground that the complaint does not state any matter of equity entitling plaintiffs to the relief prayed for, in this, that the complaint shows that the title to the land is in the United States, does not show that the plaintiffs were deprived of their alleged homestead right by any erroneous decision of the Land Department of the United States, and that Dora Reed, the wife, is living with her husband and is not entitled to enter lands under the laws of the United States.

The demurrer must be sustained. The court has no jurisdiction to quiet title to public land, the title to which is in the United States.

Marquez v. Frisbie, 101 U. S. 473.

The Land Department of the United States is a special tribunal with judicial functions, and has exclusive jurisdiction of issues affecting title to public lands until patent is issued.

Brockfinger v. Foster, 190 U. S. 116.
Humbird v. Avery, 195 U. S. 480.

Adverse possession for ten years under the limitation of actions of the State of Washington, confers no right where the legal title is in the United States.

[fol. 419] Gibson v. Choteau, 13 Wallace, 92.
Redfield v. Park, 130 U. S. 625.

Nor does Section 2289 R. & B., Codes of Washington, give the wife, as a member of the community, an interest which attaches to public lands "squatted" upon by the husband and wife prior to homestead entry.

McCune v. Essig, 199 U. S. 382.
Wadkins v. Producers Oil Co. 227 U. S. 368.

Jeremiah Neterer, Judge.

[fol. 420] UNITED STATES DISTRICT COURT, WESTERN DISTRICT OF WASHINGTON

[Title omitted]

On Demurrer to Amended Bill. Demurrer Sustained.

OPINION ON DEMURRER TO AMENDED BILL—Filed December 2, 1915

Carl E. Croson, Seattle, Washington; E. H. Flick, Seattle, Washington, for plaintiffs.

F. G. Brown, Seattle, Washington; F. G. Dore-y, Seattle, Washington, for defendants.

NETERER, District Judge:

A demurrer to the bill in equity in this case was sustained by memorandum decision filed November 23, 1915. By permission, the bill has been amended by interlining paragraph IX of the bill so that it reads:

"That said defendants claim some right, title, estate and interest in and to the foregoing described lands, more particularly to the S. W. ¼, N. W. ¼ of Section 3, *thereof by reason of government patent No. 29 issued April 13, 1908, to the Great Northern Railway Company*, but that said claim is junior and inferior to the claim and right of these plaintiffs." (The amendment is underscored.)

A demurrer has been interposed to the bill as amended. The additional facts pursuant to this discussion appear in the memorandum decision filed November 23, 1915.

It is apparent that no statement appears of any fact of a fraudulent nature or of any act done or performed by corrupt motives or corrupt means by the defendant or any of the land officers who have had to deal with this land, Marquez v. Frisbie, 101 U. S. 473, and a court [fol. 421] of equity cannot, under any untraversable allegations of error in general, be invoked, U. S. v. Trockmorton, 98 U. S. 61. A bill in equity to set aside a patent or declare the patentee a trustee must set out the facts conceded or established, upon which it is charged the officers, through error in the construction of the law, issued the patent to the wrong party; or that through fraud or gross mistake they misapprehended the facts, with the same result, and if mistake of fact is the ground of attack, the bill must allege the mistake in the finding, and also state the evidence before the Department from which the mistake resulted, as well as the particular mistake and the manner in which it occurred, and the fraud, if any, which induced it. U. S. v. Etherton, 102 U. S. 372; James v. Germania Iron Co. 107 Fed. 597. If fraud, error, mistake or wrong has been done, courts of justice present the only remedy, Moore v. Robbins, 96 F. S. 530. But to maintain a bill in equity it must be averred and proved that the land Department erred in the construction of the law applicable to the case, or that fraud was practiced upon its officers, or that they themselves were chargeable with fraudulent practices, Gonzales v. French, 164 U. S. 338, and the facts upon which these various conclusions are predicated must be stated.

The statement of settlement upon and improvement of the land and the failure to post "notices of claim under scrip*t* land laws of the United States or otherwise," does not bring plaintiff within the rule; nor does the allegation of adverse possession for ten years constitute a sufficient equity in plaintiff's favor to control the title subsequently conveyed to the defendants by the United States, Gibson v. Chouteau, 13 Wallace, 92. The allegation that "said defendants claim some right, title, estate and interest * * * in the * * * land * * * by reason of government patent No. 29 issued April 13, 1908, to the Great Northern Railway Com-

pany" is not sufficient, with the other allegations, to invoke the [fol. 422] powers of a court of equity.

The demurrer is sustained.

Jeremiah Neterer, Judge.

[fol. 423] UNITED STATES DISTRICT COURT, WESTERN DISTRICT OF WASHINGTON

[Title omitted]

ORDER SUSTAINING DEMURRER—Filed Dec. 10, 1915

The demurrer of the defendant Great Northern Railway Company to the complaint of the plaintiff having come on regularly for hearing and having been sustained by the Court, and plaintiff having amended its complaint by interlineation alleging the issuance of a patent to the Great Northern Railway Company, and it having been agreed by the parties that the said demurrer should stand as a demurrer to said complaint as amended, and both parties having submitted briefs, the court being fully advised in the premises, and having filed its memorandum opinion sustaining said demurrer.

Now, therefore, it is ordered that the said demurrer be and the same is hereby sustained with leave to the plaintiff to file an amended complaint within thirty days from the date hereof.

Done in open court this 10th day of December, 1915.

Jeremiah Neterer, Judge.

O. K. as to form. Carl E. Croson, Edwin H. Flick.

[fol. 424] IN THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON

[Title omitted]

MOTION FOR DISMISSAL—Filed March 17, 1917

Come now the defendants and move the court for an order dismissing the above entitled action and awarding costs for want of prosecution and on account of default of plaintiffs.

This motion is based upon the records and files herein and upon the affidavit of F. G. Dorety hereunto attached.

F. V. Brown, F. G. Dorey, Solicitors for Defendants.

[fol. 425] IN THE DISTRICT COURT OF THE UNITED STATES OF THE WESTERN DISTRICT OF WASHINGTON

[Title omitted]

AFFIDAVIT OF F. C. DORETY—Filed March 17, 1917

STATE OF WASHINGTON,
County of King, ss:

F. G. Dorety, being first duly sworn, on oath deposes and says: That he is one of the attorneys for the defendants in the above entitled action. That on the 10th day of December, 1915, an order was entered herein sustaining the demurrer of the Great Northern Railway Company to the complaint of the plaintiffs, and allowing the plaintiffs thirty days in which to file an amended complaint; that no amended complaint or other pleading or appearance has ever been served or filed since said date by the plaintiff, or either of them. That on the 24th day of October, 1915, the St. Paul, Minneapolis and Manitoba Railway Company served and filed its disclaimer herein, and that no further action has been taken with reference to said company. That no part of said delay has been requested or occasioned by either of said defendants.

F. G. Dorety.

Subscribed and sworn to before me this 15th day of March, 1917. L. N. Knox, Notary Public in and for the State of Washington, Residing at Seattle.

[fol. 426] IN THE DISTRICT COURT OF THE UNITED STATES FOR WESTERN DISTRICT OF WASHINGTON

[Title omitted]

REPLY BRIEF OF DEFENDANT GREAT NORTHERN RAILWAY COMPANY ON ITS DEMURRER TO COMPLAINT

The defendant's first point—that a suit to quiet title or to have a defendant decreed to hold the title in trust for plaintiff will not lie so long as the title to the land is in the United States—is, as stated by plaintiffs' counsel, disposed of by amending the complaint by inserting the words and figures: "by reason of government patent No. 29 issued April 13, 1908, to the Great Northern Railway Company;" and this court has jurisdiction to grant any relief to which plaintiff may be entitled.

As to the second point made in defendant's opening brief—that although patent has issued to this defendant the bill is demurrable in that it fails to show that plaintiffs were deprived of their homestead right by an erroneous decision of the Land Department of the

United States; the following authorities establish the principle that when a patent is issued and accepted by the patentee the United States government is divested of all title to the land and the executive department of the government loses all control over its further disposition. Also, that the only remedy which the rightful claimant has is by a bill in equity in a court of competent jurisdiction to have the patent set aside or to have the patentee decreed to hold the land in trust for him; and that such action may be sustained only upon one of two grounds: (1) That upon the facts found, conceded or established without dispute at the hearing before the [fol. 427] Department its officers fell into error in the construction of the law applicable to the case, which caused them to refuse to issue a patent to him and give it to another; or (2) That through fraud or gross mistake they fell into a misapprehension of the facts proven before them at the hearing, which had a like effect. That is to say, the Department's action in issuing a patent is final and not subject to review by the courts unless it is alleged and proven that under conceded or undisputed facts before the Department the patent was issued to the defendant by reason of an erroneous construction of a law applicable thereto, or that the patent was issued to the defendant by reason of gross mistake or fraud practiced upon the Department or by some member of the Department. And, furthermore, that the finding of the Department upon disputed facts is conclusive and not reviewable by the courts in the absence of proof of such fraud or gross mistake.

"Undoubtedly, there has been in all of them some special ground for the exercise of the equitable jurisdiction, for this court does not and never has asserted that all the matters passed upon by the Land Office are open to review in the courts. On the contrary, it is fully conceded that when those officers decide controverted questions of fact, in the absence of fraud or impositions or mistakes, their decision on those questions is final, except as they may be reversed on appeal in that department. But we are not prepared to concede that when in the application of the facts as found by them they, by misconstruction of the law, take from a party that to which he has acquired a legal right under the sanction of those laws, the courts are without power to give any relief."

Johnson v. Towsley, 13 Wall 72; 20 Law Ed. 485, 487.

"In the recent case of Shepley v. Cowan, 91 U. S. 340, the doctrine is thus aptly stated by Mr. Justice Field: 'The officers of the Land Department are specially designated by law to receive, consider and pass upon proofs presented with respect to settlements upon public lands, with a view to secure rights of preemption. If they err in the construction of the law applicable to any case, or if fraud is practiced upon them, or they themselves are chargeable with fraudulent practices, their rulings may be reversed and annulled by the courts when a controversy arises between private parties founded upon their decisions; but, for mere errors of judgment upon the weight of evi-

dence in a contested case before them, the only remedy is by appeal from one officer to another of the Department."

Moore v. Robbins, 6 Otto 530; 24 Law Ed. 848, 851.

[fol. 428] "As the claim of the plaintiff in error to the land in question was passed upon by the proper local officers of the land department, and subsequently, upon appeal, by the Commissioner of the General Land Office, and, upon a further appeal, by the Secretary of the Interior, and as the result of the contest was the granting of a patent to the probate judge of the county of Yavapal as trustee of the inhabitants of the town of Flagstaff, the plaintiff, to maintain her bill must aver and prove either that the land department erred in the construction of the law applicable to the case, or that fraud was practiced upon its officers or that they themselves were chargeable with fraudulent practices. Johnson v. Towsley, 80 U. S. 13 Wall. 72; Moore vs. Robbins, 96 U. S. 530 (24:848) Steel v. St. Louis Smelt. & Ref. Co. 106 U. S. 447 (27:226)."

Gonzales v. French, 164 U. S. 338; 41 Law ed. 458, 460.

"There being no fraud, and no clear mistake of law in the decision of the Secretary of the Interior, his findings are conclusive upon the parties in the present controversy."

Ross v. Day, 232 U. S. 110-117; 58 Law ed. 528, 530.

"The land department of the United States is a quasi judicial tribunal, invested with authority to hear and determine claims to the public lands subject to its disposition, and its decisions of the issues presented at such hearings are impervious to collateral attack, and presumptively right. A patent to land of the disposition of which the department has jurisdiction is both the judgment of that tribunal and of conveyance of the legal title to the land (quoting authority). But the judgment and conveyance of the department do not conclude the rights of the claimants to the land. They rest on established principles of law and fixed rules of procedure, which condition their initiation and prosecution, the application of which to the facts of each case determines its right decision; and, if the officers of the land department are induced to issue a patent to the wrong party by an erroneous view of the law, or by gross or fraudulent mistake of facts, the rightful claimant is not remediless. He may avoid this decision, and charge the legal title derived from the patent which they issue with his equitable right to it on either of two grounds: (1) That upon the facts found, conceded, or established without dispute at the hearing before the department its officers fell into an error in the construction of the law applicable to the case which caused them to refuse to issue the patent to him, and to give it to another (citing many authorities); or (2) that through fraud or gross mistake they fell into a misapprehension of the facts proven before them, which had the like effect (Gonzales v. French, 164 U. S. 338, 342, 17 Sup. Ct. 102, 41 L. ed. 458). If he would attack the patent on the latter ground, and avoid the department's finding of

facts, however, he must allege and prove not only that there was a mistake in the findings, but the evidence before the department from which the mistake resulted, the particular mistake that was made, the way in which it occurred, and the fraud, if any, which induced it, before any court can enter upon the consideration of any issue of fact determined by the officers of the department at the hearing (citing many authorities)."

James v. Germania Iron Co. 107 Fed. 597 (C.C.A.).

[fol. 429] Tested by this rule, it is clearly apparent that plaintiffs have failed to allege a cause of action upon either ground. At page 2, 11, 12 to 23 of plaintiff's brief, plaintiffs say:

"For answer to this contention we ask the court to look into the complaint, which sets forth the qualifications of the plaintiffs, the succession of interest since the summer of 1901, and the continuous claim under acts of Congress relating to homestead, alleges the posting of notices, the making of improvements; that the lands *was* open and unoccupied, and that there were no notices posted under the scrip laws of the United States. These allegations, being made in the complaint, together with the allegation on the issuance of the patent to the Great Northern, certainly set forth that the patent was erroneously issued to the Great Northern."

It is true that the complaint alleges these facts, but nowhere does the complaint allege that these facts were ever before the Department, or were found by the department to be the facts in the case. Under the authorities cited, if plaintiffs rely upon the ground of an erroneous application of the law by the Department which resulted in issuance of patent to this defendant instead of to plaintiffs, they must allege facts which are conceded, admitted or undisputed facts or found by the Department to be the facts of the case upon a hearing. So far as appears from the complaint the Department may have found upon conflicting evidence that there were notices posted on the land under the scrip laws of the United States, and if such finding had been made it would be final and not subject to review by this court. What set of facts conceded, admitted or undisputed, or determined by the Department to have been before the Department and to have been the facts of the case, which indicate that but for the misconstruction of a law the patent would have been issued to plaintiffs instead of this defendant, are set forth in the complaint? The complaint alleges none and plaintiffs therefore, do not make out a cause of action under the first ground.

Nor does the complaint state what the facts were which were before the department, if any, or that the facts found by the depart-[fol. 430] ment and upon which it proceeded to issue *to* patent to this defendant were found or determined by reason of fraud or gross mistake. The complaint, therefore, fails to make out a cause of action under the second ground.

As to defendant's third point—that the statute of limitations and adverse possession under the laws of the State cannot operate so long

as the legal title remains in the United States: At the bottom of page 2 of their brief plaintiffs state they have no quarrel with this proposition of law. The complaint now alleges that patent to the land in question was not issued until April 13, 1908, when it was issued to the Great Northern Railway Company. Under the principle of law which plaintiffs admit, legal title to the land was in the United States until that time and the statute of limitations could not begin to run against anyone until April 13, 1908. Assuming that plaintiffs have been in possession of the land openly, notoriously, adversely and continuously under claim of right from the 13th day of April, 1908, to the present time—a period of less than eight years—the complaint has not stated facts sufficient to give plaintiffs title by reason of adverse possession for the requisite period of ten years prescribed by Section 156 of Rem. & Bal. Code. Section 786 of Rem. & Bal. Code would not assist plaintiffs for the reason that they do not allege a connected title in law or equity deducible from the records of this state or the United States, nor do sections 788 and 789 of Rem. & Bal. Code afford any assistance as they do not allege claim and color of title made in good faith and payment of taxes for seven years.

As to this defendant's fourth point—that a married woman living with her husband is not qualified to enter land under the homestead laws of the United States: Plaintiffs in their brief impliedly admit the correctness of this statement (bottom of page 3), but state that the complaint alleges adverse possession of the premises by both Dora Reed and her husband and that, therefore, she is a proper [fol. 431] party plaintiff. This may be true, but in view of the fact that the complaint fails to state facts sufficient to make out their title by adverse possession, this question becomes immaterial.

In view, therefore, of the fact that the complaint fails to state a cause of action upon any theory whatever, this defendant respectfully submits that its demurrer to the complaint should be sustained.

Respectfully submitted, F. V. Brown, F. G. Dorety, Attorneys for Defendant Great Northern Railway Company.

[fol. 432] IN THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON

[Title omitted]

PLAINTIFF'S ANSWER TO DEMURRER OF DEFENDANT GREAT NORTHERN RAILWAY COMPANY AND AUTHORITIES SUBMITTED IN SUPPORT THEREOF

At the hearing on the demurrer the court granted the plaintiffs leave to amend their complaint by interlineation, so as to show that a patent had issued, interlining in paragraph IX of the complaint after the word "thereof" in the third line of the said paragraph by inserting the following words and figures, to-wit: "by reason of

government patent No. 29 issued April 13, 1908, to the Great Northern Railway Company."

The first point of the defendant's brief is thus disposed of, as it then appears from the complaint that a patent has issued so that the title is not in the United States. We have no quarrel with the authorities cited in substantiation of the point that as long as the title to the land is in the United States that a suit to quiet title or have the defendant decreed to hold the title in trust for the plaintiffs will not lie, but by the interlineation this point becomes immaterial.

By reason of the interlineation the complaint then sets forth that the patent from the government has issued and that the government has divested itself of all right in and to the land. Courts of equity will then inquire into the respective rights of private claimants "and see whether according to the established rules of equity and the acts of Congress concerning public lands the party hold the title should hold absolutely as his own or as trustee for another." [fol. 433] The above quoted language is from the leading case of Johnson v. Towsley, 20 Law ed. page 485 at 488—13 Wall. 72. The above case is approved in Moore v. Robbin, 24 Law. ed. at page 841, first column.

Counsel argues at the bottom of page one of his brief that the bill is still demurrable after setting forth that the patent has been issued to the Great Northern Railway Company in that it fails to show that the plaintiffs were deprived of their homestead right by any erroneous decision of the Land Department. For answer to this contention we ask the court to look into the complaint which sets forth the qualification of the plaintiffs, the succession of interest since the summer of 1901, and the continuous claim under acts of Congress relating to homestead, alleges the posting of notices, the making of improvements; that the land was open and unoccupied, and that there were no notices posted under the scrip laws of the United States. These allegations, being made in the complaint, together with allegations of the issuance of the patent to the Great Northern, certainly set forth that the patent was erroneously issued to the Great Northern. Certainly the plaintiffs are not compelled to plead a conclusion and state in so many words that the patent issued to the defendant was erroneously issued. The allegations made, if proved, will constitute facts from which the court will determine whether or not the patent was erroneously issued.

We have no quarrel with the proposition of law laid down in the first complete paragraph on page two of the defendant's brief.

Defendant further demurs on the ground that Dora Reed is joined as party plaintiff, and that it appears that she is the wife of Charles W. Reed, and living with him on the premises. It is difficult for us to see why the joinder of the wife of Charles W. Reed could in any [fol. 434] way prejudice the defendant. Moreover, it is our contention that Dora Reed is a proper party under the allegations of the complaint. The supreme court has said that—

"A proper party as distinguished from one whose presence is necessary to the determination of the controversy is one who has

an interest in the subject matter of the litigation, which may be conveniently settled therein."

Sioux City Terminal Railroad & Warehouse Co. vs. Trust Co. 82 Fed. 124 at 126.

The complaint alleges a possessory interest and states that the plaintiffs have at all times etc.; the complaint therefore sets forth a possessory claim on the part of both the plaintiffs, thus raising an issue to be tried, in which Dora Reed as the wife of Charles W. Reed is a proper party. If title is acquired by adverse possession the title is acquired by the community, and Dora Reed has a right to be heard in the determination of that ishue. The complaint alleges the actual possession of the property by the plaintiffs. She has a right to have determined her rights under the possession, and her possession together with that of her husband is notice to the world of a claim of right.

In Brown vs. Safe Deposit Co. 128 U. S. 403 at 412, the United States Supreme Court said:

"It is not indispensable that all the parties should have an interest in all the matters contained in the suit. It will be sufficient if each party has an interest in some material matters in the suit, and they are connected with the others."

So that while the proposition as stated by counsel for defendant may be true, that is, that the wife would not be a proper or necessary party to the determination of the rights of Charles W. Reed under any by reason of the homestead laws of the United States, yet she is a proper party in the determination of the claim by reason of possession and a determination of the adverse possession claim. Under the above holdings of the Supreme Court she would be a proper party in this suit.

[fol. 435] We therefore submit that the defendant's demurrer should be overruled except as to his first point upon which the demurrer is confessed and leave of court has already been obtained to amend by interlineation.

Respectfully submitted, Carl E. Croson, E. H. Flick.

[fol. 436] In the District Court of the United States for the Western District of Washington

[Title omitted]

Order of Dismissal

The motion of the defendants for an order dismissing the action for want of prosecution having come up regularly for hearing, and it appearing that on the tenth day of December, 1915, an order was entered herein sustaining the demurrer of the Great Northern

Railway Company to the complaint of the plaintiffs and allowing the plaintiffs thirty days in which to file an amended complaint, and that no amended complaint or other pleading or appearance has ever been served or filed since said date by said plaintiff or either of them; and that on October 24, 1915, the defendant St. Paul, Minneapolis & Manitoba Railway Company served and filed its disclaimer herein, and that no further action has been taken with reference to said company.

Now, therefore, it is ordered that the above entitled action be and the same is hereby dismissed without prejudice and that the defendants have judgment against the plaintiffs for their costs and disbursements herein.

Done in open court this 14th day of May, 1917.

Jeremiah Neterer.

Notice of presentation waived. Carl E. Croson, Atty. for Plaintiffs.

[fol. 437] IN THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON

[Title omitted]

REPLY BRIEF OF DEFENDANT GREAT NORTHERN RAILWAY COMPANY ON ITS DEMURRER TO COMPLAINT

This defendant's first point—that a suit to quiet title or to have a defendant decreed to hold the title in trust for plaintiff will not lie so long as the title to the land is in the United States—is, as stated by plaintiff's counsel, disposed of by amending the complaint by inserting the words and figures: "by reason of government patent No. 29 issued April 13, 1908, to the Great Northern Railway Company;" and this court has jurisdiction to grant any relief to which plaintiffs may be entitled.

As to the second point made in defendant's opening brief—that although patent has issued to this defendant the bill is demurrable in that it fails to show that plaintiffs were deprived of their homestead right by an erroneous decision of the land department of the United States: The following authorities established the principle that when a patent is issued and accepted by the patentee the United States Government is divested of all title to the land and the executive department of the government loses all control over its further disposition. Also, that the only remedy which the rightful claimant has is by a bill in equity in a court of competent jurisdiction to have the patent set aside or to have the patentee decreed to hold the land in trust for him; and that such action may be sustained only upon one of two grounds: (1) that upon the facts found, con-[fol. 438] ceded or established without dispute at the hearing before the department its officers fell into error in the construction of the

law applicable to the case, which caused them to refuse to issue a patent to him and give it to another; or (2) That through fraud or gross mistake they fell into a misapprehension of the facts proven before them at the hearing, which had a like effect. That is to say, the Department's action in issuing a patent is final and not subject to review by the courts unless it is alleged and proven that under conceded or undisputed facts before the Department the patent was issued to the defendant by reason of an erroneous construction of a law applicable thereto, or that the patent was issued to the defendant by reason of gross mistake or fraud practiced upon the department or by some member of the Department. And, furthermore, that the finding of the Department upon disputed facts is conclusive and not reviewable by the courts in the absence of proof of such fraud or gross mistake.

"Undoubtedly there has been in all of them some special ground for the exercise of the equitable jurisdiction, for this court does not and never has asserted that all the matters passed upon by the Land Office are open to review in the courts. On the contrary, it is fully conceded that when those officers decide controverted questions of fact in the absence of fraud or impositions or mistake, their decision on those questions is final, except as they may be reversed on appeal in that department. But we are not prepared to concede that when in the application of the facts as found by them they, by misconstruction of the law, take from a party that to which he has acquired a legal right under the sanction of those laws, the courts are without power to give any relief."

Johnson v. Towsley, 13 Wall. 72, 20 Law Ed. 485, 487.

"In the recent case of Chepley v. Cowan, 91 U. S. 340, the doctrine is thus aptly stated by Mr. Justice Field: 'The officers of the Land Department are specially designated by law to receive, consider and pass upon proofs presented with respect to settlements upon public lands, with a view to secure rights of preemption. If they err in the construction of the law applicable to any case, or if fraud is practiced upon them, or they themselves are chargeable with fraudulent practices, their rulings may be reversed and annulled by the courts when a controversy arises between private parties founded upon their decisions; but, for mere errors of judgment upon the weight of evidence in a contested case before them, the only remedy is by appeal from one officer to another of the department.'"

Moore v. Robbins, 6 Otto, 530; 24 Lad ed. 848, 851.

[fol. 439] "As the claim of the plaintiff in error to the land in question was passed upon by the proper local officers of the land department, and subsequently, upon appeal, by the Commissioner of the General Land Office, and upon a further appeal, by the Secretary of the Interior, and as the result of the contest was the granting of a patent to the probate judge of the county of Yavapai as trustee of the inhabitants of the town of Flagstaff the plaintiff, to maintain her bill, must aver and prove either that the land department erred

in the construction of the law applicable to the case, or that fraud was practiced upon its officers or that they themselves were chargeable with fraudulent practices. Johnson v. Towsley, 80 U. S. 13 Wall. 72; Moore vs. Robbins, 96 U. S. 530 (24:848) Steel v. St. Louis Smelt. & Ref. Co. 106 U. S. 447 (27:226).

Gonzales v. French, 164 U. S. 338: 41 Law ed. 458, 460.

"There being no fraud, and no clear mistake of law in the decision of the Secretary of the Interior, his findings are conclusive upon the parties in the present controversy."

Ross v. Day, 232 U. S. 110-117; 58 Law ed. 528, 530.

"The land department of the United States is a quasi judicial tribunal, invested with authority to hear and determine claims to the public lands subject to its disposition, and its decisions of the issues presented at such hearings are impervious to collateral attack, and presumptively right. A patent to land of the disposition of which the department has jurisdiction is both the judgment of that tribunal and a conveyance of the legal title to the land (quoting authority). But the judgment and conveyance of the department do not conclude the rights of the claimants to the land. They rest on established principles of law and fixed rules of procedure, which condition their initiation and prosecution, the application of which to the facts in each case determines its rights decision; and, if the officers of the land departement are induced to issue a patent to the wrong party by an erroneous view of the law, or by a gross or fraudulent mistake of the facts, the rightful claimant is not remediless. He may avoid this decision, and charge the legal title derived from the patent which they issue with his equitable right to it on either of two grounds: (1) That upon the facts found, conceded or established without dispute at the hearing before the department its officers fell into an error on the construction of the law applicable to the case which caused them to refuse to issue the patent to him, and to give it to another (citing many authorities); or (2) that through fraud or gross mistake they fell into a misapprehension of the facts proven before them which had the like effect. (Gonzales v. French 164 U. S. 338, 342, 17 Sup. Ct. 102, 41 L. ed. 458). If he would attack the patent on the latter ground, and avoid the department's finding of facts, however, he must allege and prove not only that there was a mistake in the findings, but the evidence before the department from which the mistake resulted, the particular mistake that was made, the way in which it occurred, and the fraud, if any, which induced it, before any court can enter upon the consideration of any issue of fact determined by the officers of the department at the hearing (Citing many authorities.")

James v. Germania Iron Co., 107 Fed. 597 (C. C. A.).

[fol. 440] Tested by this rule, it is clearly apparent that plaintiffs have failed to allege a cause of action upon either ground. At page 2, 11, 12 to 23, of plaintiffs' brief, plaintiffs say:

"For answer to this contention we ask the court to look into the complaint, which sets forth the qualifications of the plaintiffs, the succession of interest since the summer of 1901, and the continuous claim under acts of Congress relating to homestead, alleges the posting of notices, the making of improvements; that the land was open and unoccupied, and that there were no notices posted under the scrip laws of the United States. These allegations, being made in the complaint, together with the allegations on the issuance of the patent to the Great Northern, certainly set forth that the patent was erroneously issued to the Great Northern".

It is true that the complaint alleges these facts, but nowhere does the complaint allege that these facts were ever before the Department, or were found by the Department to be the facts in the case. Under the authorities cited, if plaintiffs, rely upon the ground of an erroneous application of the law by the Department which resulted in issuance of patent to this defendant instead of to plaintiffs, they must allege facts which are conceded, admitted or undisputed facts or found by the Department to be the facts of the case upon a hearing. So far as appears from the complaint the Department may have found upon conflicting evidence that there were notices posted on the land under the scrip laws of the United States, and if such finding had been made it would be final and not subject to review by this court. What set of facts conceded, admitted or undisputed, or determined by the department to have been before the Department and to have been the facts of the case, which indicate that but for the misconstruction of a law the patent would have been issued to plaintiffs instead of this defendant, are set forth in the complaint? The complaint alleges none and plaintiffs, therefore, do not make out a cause of action under the first ground.

Nor does the complaint state what the facts were which were before the Department, if any, or that the facts found by the Department and upon which it proceeded to issue *to* patent to this defendant [fol. 441] were found or determined by reason of fraud or gross mistake. The complaint, therefore, fails to make out a cause of action under the second ground.

As to defendant's third point—that the statute of limitations and adverse possession under the laws of the State cannot operate so long as the legal title remains in the United States: At the bottom of page 2 of their brief plaintiffs state they have no quarrel with this proposition of law. The complaint now alleges that patent to the land in question was not issued until April 13, 1908, when it was issued to the Great Northern Railway Company. Under the principle of law which plaintiffs admit, legal title to the land was in the United States until that time and the statute of limitations could not begin to run against anyone until April 13, 1908. Assuming the plaintiffs have been in possession of the land openly, notoriously, adversely and continuously under claim of right from the 13th day of April, 1908, to the present time—a period of less than eight years—the complaint has not stated facts sufficient to give plaintiffs title by reason of adverse possession for the requisite period of ten years pre-

scribed by Section 156 of Rem. & Bal. Code. Section 786 of Rem. & Bal. Code would not assist plaintiffs for the reason that they do not allege a connected title in law or equity deducible from the records of the state or the United States, nor do sections 788 and 789 of Rem. & Bal. Code afford any assistance as they do not allege claim and color of title made in good faith and payment of taxes for seven years.

As to this defendant's fourth point—that a married woman living with her husband is not qualified to enter land under the homestead laws of the United States: Plaintiffs in their brief impliedly admit the correctness of this statement (bottom of page 3), but state that the complaint alleges adverse possession of the premises by both [fol. 442] Dora Reed and her husband and that, therefore, she is a proper party plaintiff. This may be true, but in view of the fact that the complaint fails to state facts sufficient to make out their title by adverse possession this question becomes immaterial.

In view, therefore, of the fact that the complaint fails to state a cause of action upon any theory whatever, this defendant respectfully submits that its demurrer to the complaint should be sustained.

Respectfully submitted, F. V. Brown, F. G. Dorety, Attorneys for Defendant Great Northern Railway Company.

[fol. 443] UNITED STATES OF AMERICA,
Western District of Washington, ss:

Clerk's Certificate

I, F. M. Harshberger, clerk of the District Court of the United States for the Western District of Washington, do hereby certify that I have compared the foregoing copy with the original Complaint filed Oct. 8, 1915, Appearance filed and entered October 8, 1915, Præcipe filed Oct. 8, 1916, Subpœna issued Oct. 8, 1915, Demurrer filed Oct. 29, 1915, Answer filed Oct. 29, 1915, Appearance filed and Entered Oct. 29, 1915, Points and Authorities in support of Demurrer filed Nov. 1, 1915, Decision Filed Nov. 23, 1915. Decision filed Dec. 2, 1915, Order sustaining Demurrer filed and entered Dec. 10, 1915, Motion for Dismissal filed March 17, 1917, Affidavit filed March 17, 1917, Reply brief, answer to Demurrer, Reply Brief, and order of dismissal, in the foregoing entitled cause, now on file and of record in my office at Seattle, and that the same is a true and perfect transcript of said originals and the whole thereof.

Witness my hand and the seal of said Court, this 22nd day of June, 1920.

F. M. Harshberger, Clerk, by Leeta D. Manning, Deputy.
(Seal of U. S. Dist. Court.)

[fol. 444] [File endorsement omitted]

DEFENDANTS' EXHIBIT No. 4—Filed June 24, 1920

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON

[Title omitted]

COMPLAINT—Filed November 26, 1913

Comes now plaintiff in the foregoing action and respectfully alleges:

I

That St. Paul, Minneapolis & Manitoba Railway Company is and was at all times herein mentioned a foreign corporation doing business under said name within the State of Washington.

II

That Charles W. Reed did on Feb. 6, 1907 duly make proper application for entry under homestead laws of the United States of what is technically described as Lot 4, and the southwest quarter of the northwest quarted and the west half of the southwest quarter of section 3, Township 39 North, Range 6 East, W. M., and that at the same time said defendant herein made application to adjust its selection of certain lands in said vicinity, and particularly the southwest quarter of the northwest quarter of said section 3, having made selection of said tract under the act of Aug. 5, 1892, 27 Stat. 360 under date of May 5, 1902.

III

[fol. 445] That plaintiff and his predecessors in interest all being qualified to enter lands under the homestead laws of the United States, have successfully and continuously occupied the land here in issue as such homestead claimants since April 1, 1902, and were so occupying the same on May 5, 1902, and that said improvements upon said land were proper notice to said selector of such occupancy. Further, that due and proper notice of claim of said land under the homestead laws was posted by said first settler on or about Oct. 1901, and that such due notice remained constantly posted upon said land, advising anyone interested of the claim of said respective homesteaders to said land from October 1902 to the present date.

IV

Further, that the proper tract books being the official records on file in the local Land Office for the entry of applications for homesteads, exhibits the application of plaintiff herein as filed simultane-

ously at earliest date legally possible, with said, the application to adjust its selection on the part of defendant herein.

V

That no adjudication of priority rights has been had between plaintiff and defendant herein in the Land Department of the United States.

VI

That on to-wit, April 13, 1908 through inadvertence and mistake the said General Land Office, Department of the Interior, of the United States of America, issued a pretended patent to the land here in issue to said defendant St. Paul, Minneapolis and Manitoba Railway Company, and that the same is now duly of record in the office of the Auditor of Whatcom County, Washington, and that no transfer has yet been made by said company; that there are no intervening adverse rights.

[fol. 446]

VII

That due and proper protest and petition to vacate said patent has been filed in the Land Department of the United States and that hearing will be had in the course of the next six months on the relative rights to said land as between plaintiff and defendant herein.

VIII

That said patent is void and of no effect.

IX

That there is danger that said land may be conveyed by defendant herein to a purchaser for value and without notice, and that a restraining order should issue out of this court to said defendant requiring said defendant to retain title and possession to said lands pending said hearing herein referred to, and that upon settlement of said rights in the proper department, that this matter should proceed *proceed* on the part of the United States on the relation of said Charles W. Reed to vacate the patent now of record, and to quiet title in said relator.

Wherefore, Your relator respectfully prays the issuance of an injunctional order requiring defendant herein to retain the status quo as affecting said property involved in this suit, and for an order granting the issuance of a Lis Pendens to be filed in the proper offices describing the land and referring to the suit herein entitled, and for such further and different relief as to this Honorable Court may seem meet.

Carl E. Croson, E. H. Flick, Attorneys for Plaintiff, 900 Leary Building, Seattle, Wash.

[fol. 447] Jurat showing the foregoing was duly sworn to by Chas. W. Reed; omitted in printing.

[fol. 448] UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON

[Title omitted]

APPEARANCE—Filed Nov. 26, 1913.

To the Clerk of the above entitled court:

You will please enter our appearance as attorney for Charles W. Reed, in the above entitled cause, and service of all subsequent papers, except writs and process, may be made upon said Charles W. Reed by leaving the same with

Carl E. Croson, Office Address, 900 Leary Bldg., N. 304.

NOTICE.—Attorneys will please endorse their own filings. Rule 11.

[fol. 449] UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON

[Title omitted]

PRÆCIPE—Filed Nov. 26, 1913

To the Clerk of the above-entitled court:

You will please issue subpœna and serve copy in the above entitled cause.

Carl E. Croson.

NOTICE.—Attorneys will please endorse their own filings. Rule 11.

[fol. 450] UNITED STATES OF AMERICA:

UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON

In Equity. No. 25

SUBPŒNA—Filed Nov. 29, 1913

The President of the United States of America to St. Paul, Minneapolis & Manitoba Railway Company, a corporation, Greeting:

You are hereby commanded, that you be and appear in said District Court of the United States aforesaid, at the Court room of

said Court, in the City of Seattle on the 16th day of December, 1913, to answer a Bill of Complaint filed against you in said Court by

United States on the relation of Charles W. Reed, and to do and receive what the Court shall have considered in that behalf. And this you are not to omit under the penalty of law.

Witness the Honorable Jeremiah Neterer, Judge of said Court, and the seal thereof at Seattle, Washington, this 26th day of November, 1913.

Frank L. Crosby, Clerk, by Ed M. Lakin, Deputy Clerk.
(Seal of U. S. Dist. Court.)

Memorandum Pursuant to Rule 12, Supreme Court U. S.

You are hereby required to enter your appearance in the above-mentioned suit on or before twenty days from the date of service, excluding the day thereof, at the Clerk's office of said Court, pursuant to said Bill; otherwise the said bill will be taken pro confesso.

Frank L. Crosby, Clerk, by Ed. M. Lakin, Deputy Clerk.
(Seal of U. S. Dist. Court.)

[fol. 451] UNITED STATES OF AMERICA,
Western District of Washington, ss:

MARSHAL'S RETURN

I hereby certify, That I have served the within writ by delivering to and leaving a true copy thereof with T. J. Moore, City Passenger and Ticket Agent of the Great Northern Railway Company, Successor in interest to the within named St. Paul, Minneapolis & Manitoba Railway Company, personally at Seattle, Western District of Washington, this 29th day of November, 1913.

Joseph R. H. Jacoby, United States Marshal, by Geo. B. Davenpeck, Deputy.

Fees: $2.12.

Filed Nov. 29, 1913.

[fol. 452] IN THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON

[Title omitted]

ORDER ALLOWING THE FILING OF A LIS PENDENS—Filed Nov. 28, 1913

This matter coming on for hearing this 28th day of November, 1913, and it appearing to the court that the relator, Charles W.

Reed, has heretofore by the permission of the District Attorney of the United States for the Western District of Washington, Northern Division, filed his complaint in the above entitled cause, and the relator being desirous of filing a lis pendens in the above entitled cause;

It is hereby ordered, and permission is hereby granted, to file a lis pendens in the above entitled cause in Whatcom County, State of Washington.

Done in open court this 28th day of November, 1913.

Jeremiah Neterer, Judge.

[fol. 453] UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON

[Title omitted]

APPEARANCE—Filed Dec. 19, 1913

To the Clerk of the above-entitled court:

You will please enter our appearance as attorneys for defendant in the above entitled cause, and service of all papers, except writs and process, may be made upon said defendant by leaving the same with

F. V. Brown and F. G. Dorety, Office Address 302 King St. Pass. Sta., Seattle, Washington.

NOTICE.—Attorneys will please endorse their own filings. Rule 11.

[fol. 454] IN THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON

[Title omitted]

DEMURRER—Filed Dec. 19, 1913

Now comes the defendant and demurs to the complaint of the plaintiff herein upon the ground and for the reason that the same does not state facts sufficient to constitute a cause of action against this defendant.

Dated, Seattle, Washington, this 18th day of December, 1913.

F. V. Brown, F. G. Dorety, Attorneys for Defendant.

[fol. 455] IN THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON

[Title omitted]

DEMURRER—Filed Dec. 24, 1913

Now comes the defendant and demurs to the complaint of the plaintiff herein upon the ground and for the reason that the same does not state facts sufficient to constitute a cause of action against this defendant.

Dated, Seattle, Washington, this 19th day of December, 1913.

F. V. Brown, F. G. Dorety, Attorneys for Defendant.

[fol. 456] IN THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON

[Title omitted]

STIPULATION—Filed Oct. 8, 1915

It is hereby stipulated by and between F. V. Brown and F. G. Dorety, attorneys for the defendant, and Carl E. Croson and E. H. Flick, attorneys for the plaintiff herein, that the above entitled cause may be, and hereby is, dismissed without costs and without prejudice.

Dated at Seattle, Washington, this 8 day of October, 1915.

Carl E. Croson, E. H. Flick, Attorney- for Plaintiff. F. V. Brown, F. G. Dorety, Attorneys for Defendant.

[fol. 457] IN THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON

[Title omitted]

ORDER OF DISMISSAL—Filed Oct. 8, 1915

This matter coming on for hearing this 8th day of October, 1915, and it appearing to the court that the parties, by their respective attorneys, have stipulated for the dismissal of the above-entitled cause without cost and without prejudice;

It is hereby considered, ordered, adjudged and decreed that the above-entitled cause be, and hereby is, dismissed without prejudice and without costs to any party.

Done in open court this 8th day of October, 1915.

Jeremiah Neterer, Judge.

O. K. F. G. D.

[fol. 458] UNITED STATES OF AMERICA,
Western District of Washington, ss:

CLERK'S CERTIFICATE

I, F. M. Harshberger, Clerk of the District Court of the United States for the Western District of Washington, do hereby certify that I have compared the foregoing copy with the original Complaint filed Nov. 26, 1913; appearance filed and entered Nov. 26, 1913; Praecipe filed Nov. 26, 1913; Subpœna issued No. 26, 1913; Order Allowing the filing of a lis pendens filed and entered Nov. 28, 1913; Appearance filed and entered Dec. 19, 1913; Demurrer filed Dec. 19, 1913; Demurrer filed Dec. 24, 1913; Stipulation filed Oct. 8, 1915; Order of Dismissal filed and entered Oct. 8, 1915, in the foregoing entitled cause, now on file and of record in my office at Seattle, and that the same is a true and perfect transcript of said original and of the whole thereof.

Witness my hand and the seal of said Court, this 21st day of June, 1920.

F. M. Harshberger, Clerk, by Leeta D. Manning, Deputy.
(Seal U. S. Dist. Court.)

[fol. 456] EXHIBIT IN EVIDENCE

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

No. 19-E (Bellingham)

GEORGE B. GALLUP, Plaintiff,

vs.

NORTHERN PACIFIC RAILWAY COMPANY, a Corporation, et al., Defendants

DECISION—Filed January 23, 1924. Filed in Supreme Court of Washington Jan. 30, 1924. C. S. Reinhart, Clerk. F. S. G.

On February 15, 1901, James Pinky, a qualified entryman, entered upon the unsurveyed public land in question. He remained over-

night, marked a trail, and returned May 16th following, remaining about three weeks, and built a shake cabin ten or twelve by sixteen feet; furnished it with a stove, bed, and cooking utensils, and had a saw, hoe, grub hoe and axes therein; also built a trail and cleared some land, planted potatoes, and posted notices of claim of homestead. The value of the improvements placed upon the land were about two hundred dollars. He was there the latter part of June of the same year for two days, and in August following for two days, and again in 1904. He did not have any domestic animals or fowls on the place. He was married. His wife never was on the land, but lived at Lawrence about twenty miles away. The cabin was in plain view and could be readily observed; the furnishings were in the house at all times. Plaintiff went on the land in December, 1906, saw the Pinky cabin and noticed its contents, and then purchased from Pinky, who was not then on the land, the improvements and possessory right for $25.00. The plaintiff built a house upon the land and established his home thereon. He has cleared and cultivated something over an acre of land, planting potatoes and strawberries thereon, and slashed about three or four [fol. 460] acres. The value of improvements placed upon the land, according to plaintiff, is a thousand dollars, and according to witness for the defendant, from six to eight hundred dollars. On August 29, 1902 the Northern Pacific Railway Company selected the land under the provisions of the Act of Congress of July 1, 1898, 30 Stat. 620. Plat showing survey was filed February 6, 1907. On March 1, 1907, the defendant company adjusted the selection. On February 7, 1907, the plaintiff tendered for filing a homestead application, which was rejected, claiming to be the successor in interest of Pinky and settlement by himself December, 1906. Appeal was prosecuted through the Department and application rejected, the department holding that "Pinky was not in fact a bona fide settler on the land on the date of the company's selection thereof; that Pinky never in fact, initiated a valid settlement claim; and that even if he did so, his absence from September, 1901, until August, 1902, was sufficient to raise a conclusive presumption of abandonment. In order to maintain a valid settlement claim initiatory acts of settlement must be followed, within a reasonable time, by the establishment of residence. The defendant Bellingham Bay Improvement Company claims some interest in the land by transfer by the railway company. The plaintiff seeks to declare the defendant's trustees of the legal title to the land in issue for their use and benefit, to enforce conveyance of legal title to them, and to have their title quieted as against the claims of the defendants.

S. M. Bruce, Esq., Attorney for plaintiff.
C. W. Howard, Esq., Attorney for defendants.

NETERER, D. J.:

[fol. 461] The act under which the script was filed provides among other things that the land must be "free from valid adverse claims

or not occupied by settlers at the time of such selection." The issue, therefore, is simple. Was the relation of Pinky to this land on the 29th day of August, 1902, such as to create an adverse right or claim?

There is a distinction between "right" and "claim". Reed v. G. N. et al. 26 Wash. Dec. 305. The defendant railway company could not, at the time of filing its script, confuse its asserted right with a right which might be asserted by the United States; it may not usurp the functions of sovereignty and assert the right which might be available to the sovereign. This court held in Christy v. G. N., filed June 24, 1920, and affirmed 204 Fed. 702, that:

"The United States might maintain an action under the facts set out, but the plaintiffs may not bring an action by asserting facts which would afford relief to the United States."

The defendants here may not succeed by asserting facts which would afford relief to the government. Fisher v. Hale, 249 U. S. 314.

Undoubtedly the acts of Pinky, of posting notices and placing the improvements on the land, as shown by the evidence, were the assertion of a right; it created a condition. He became in a limited sense a planter upon the land. The buildings were his property. He had a right to go upon the land. He was in posession of the land as against all except the United States. Settlement and improvement, with intent to enter the land as a homestead, without habitation, initiated a claim or right which segregated the land from entry. This relation attached a claim to the entryman, Pinky, which the defendant railway could not dispute or ignore. Hastings & D. R. R. v. Whitney, 132 U. S. 357. Osborne v. Froyseth, 216 U. S. 571.

[fol. 462] "Claim" is comprehensive when applied to the relation of men and things, and if the entryman's conduct was open to inquiry on any feature when the script was filed, the selection did not attach. Default on the part of Pinky after the land was segregated by claim and settlement did not subject the land to script filing by the defendant company, unless intention to abandon which had ripened into abandonment, was shown at the time of the filing of the script.

Abandonment is more than absence of residence. It has been held to be more than intention. Hoffman v. Smith, 84 Pac. 802. Whether the land had been abandoned was an open question of fact. The claim was existent prior to August 29, 1902, and mere absence from September, 1901, until August, 1902, was not sufficient to raise a conclusive presumption of abandonment. The house was maintained. The furnishings were kept and continued. Nothing was removed. Mere absence for the period mentioned did not cancel the claim, R. S. 3291, nor did the absence of Pinky's family from the land create a conclusive presumption of abandonment. The refusal of a wife to move upon public land does not defeat a qualified entryman's homestead right. Abandonment was therefore an open question. The claim, after initiation, could not be treated as cancelled by the railway company. It could only be cancelled by the government at the behest of the next settler. St. P. R. & R. Co. v.

Donohue, 210 U. S. 21. Svor v. Morris, 227 U. S. 524. K. P. R. R. v. Dunmeyer, 629. Sioux City, etc., Ry. v. Gaffy, 145 U. S. 32. Bardon v. N. P. R. R. Co. 145 U. S. 535. The land having been segregated from selection, the script of the railway did not attach. The land was therefore open to entry when the plaintiff succeeded to Pinky's right and actually settled thereon, and his improvements and habitation have been continuous. The motion to dismiss is denied.

Jeremiah Neterer, U. S. District Judge.

[fol. 463] IN SUPREME COURT OF WASHINGTON

[Title omitted]

[No. 17805. Department Two. September 10, 1923]

OPINION

Respondents, as plaintiffs, sought by this action to have the defendants declared to be trustees holding the legal title to a certain forty-acre tract of land in Whatcom county for their use and benefit; to enforce conveyance of the legal title to them; and to have their title quieted as against the claims of the defendants. The defendant St. Paul, Minneapolis & Manitoba Railway Company was not served with process, and did not appear. The defendant Director General of Railroads filed a disclaimer; and the defendant Great Northern Railway Company filed an answer and cross-complaint alleging title in it. A trial upon the merits upon the issues thus raised resulted in a decree awarding to plaintiffs the relief sought, from which decree the defendant Great Northern Railway Company has appealed.

The facts are not greatly in dispute, so far as material to our present inquiry, and are shown to be substantially as follows: In [fol. 464] September or October, 1901, one W. J. Tincker, being duly qualified to enter land under the homestead laws, went upon the northwest quarter of Section 3, Township 39, North, Range 6 E., W. M., blazed a line around the same, posted notices on the four corners, and claimed the quarter section of land described as his homestead, it being then unsurveyed, vacant government land. He spent but a few hours on the land at that time, and did not go upon it again until some time between February and May, 1902. At that time he blazed a trail from the Nooksack River to the northwest corner of his claim, laid some poles or logs as a foundation for a cabin, which he did not complete; and from 1902 to 1906, Tincker was on his claim on an average of once or twice a year, usually while on a hunting trip, and at these times he renewed his posted notices.

During all of this period, Tincker was a married man, living with his wife and family at Maple Falls, and there maintaining a home. He did no other work on the land, and neither he nor any member of

his family ever actually resided upon or cultivated the land. In August, 1906, Tincker sold his rights and relinquished his claim in consideration of $25 to one W. M. Smithey, who immediately removed Tincker's notices and posted his own in lieu thereof, claiming not the identical quarter section claimed by Tincker, but four forty-acre subdivisions, described as the west half of the west half of the section, including, as did the Tincker claim, the northwest quarter of the northwest quarter, which is the subject of this action.

Smithey blazed a trail from the north line of the section to a point on the forty acres here in dispute, where he cleared an area about one hundred feet square, and at that place he sawed a cedar tree into sections for shakes to build a house, but the shakes were never split, and the house was never built. Smithey was on the land engaged in this work some five days at that time, continued to claim the land from August to November, 1906, and spent a day or so each week during that interval in swamping out trees and blazing trails. During this time, Smithey resided with his wife and family at Maple Falls, and neither he nor any member of his family took up acutal residence on the land.

On November 24, 1906, Smithey sold his claim and executed a relinquishment to Charles W. Reed, one of the plaintiffs, for a [fol. 465] consideration of $50. Immediately upon purchasing the claim, Reed removed Smithey's notices and posted his own, claiming the west half of the west half of the section, as Smithey had done. He immediately began clearing and the construction of a cabin on the forty acres lying immediately north of the land in controversy, packed in supplies and prosecuted the work diligently, and as soon as he had provided a suitable shelter for his famliy, and about March 1, 1907, he moved his family to the cabin and has continuously resided there since that time.

At the time of the trial below, respondents' improvements consisted of a house, woodshed, root house, tool house, barn, an acre or so in cultivation and several acres slashed, all on the forty acres lying immediately north of the one in question. In addition, good trails had been constructed, one of which was across the forty acres here involved, and the area originally cleared by Smithey on the tract in dispute had been planted to berries.

On May 5, 1902, the St. Paul, Minneapolis & Manitoba Railway Company filed a selection list in the United States Land Office at Seattle, under the Act of August 5, 1892, entitled "An Act for the relief of settlers upon certain lands in the States of North Dakota and South Dakota," in and by which the forty acres in controversy was selected and claimed; and on June 21, 1902, filed a supplemental or amended list describing the same land, each of which was supported by an affidavit on behalf of the railway company to the effect that the lands included in the list were vacant and unappropriated, not mineral or reserved lands, and of the character contemplated by the Act of Congress above referred to. It will be seen that, prior to the filing of either the original or amended list, Tincker had undertaken to initiate his claim by blazing the lines,

posting notices, and doing a small amount of other work as hereinbefore indicated.

A plat of the survey of the township in which the land lies was filed with the local land office on February 6, 1907; and on that day Charles W. Reed, the respondent, also filed with the local land office his application to enter the west half of the west half of the section, including this forty acres, as a homestead. His application was received by the land office officials without objection, and he was not then informed by the officials, or from any other source, [fol. 466] that the land had been selected by the railway company, and apparently he had no notice or knowledge of any such selection at that time, or at any time until December 1, 1909.

About March 11, 1907, the officials of the local land office transmitted to the General Land Office the supplemental list filed by the railway company February 23, 1907, after the plat of survey had been filed, with a certificate in which they certify, in effect, that there was no prior homestead or other valid claim to any portion of the lands selected, on file or of record in the local land office. The certificate failed to show the homestead entry by respondent Reed, which was then on file, and it is claimed that this certificate was false and fraudulent as to respondents, in that, without notice to respondents or any opportunity to be heard, the local land office officials thereby adjudicated that respondents' claim was not prior to that of the railway company.

Thereafter, still without notice to respondents, patent dated April 13, 1908, was issued to the railway company for the land in question. On December 1, 1909, respondent Charles W. Reed appeared before the local land office for the purpose of making final proof upon his homestead entry, and was then informed, as it appears, for the first time, that this forty-acre tract had been selected by the railway company, and a patent issued to it therefor. Various efforts were made to have the matter re-opened and a hearing accorded by the Land Department, all without success, and finally respondents resorted to this action for relief. The judgment below, from which this appeal is prosecuted, granted the relief prayed for.

Many points are presented and argued here, but because of the involved nature of the case, and the inevitable length of this opinion, our discussion will be confined to the points we find to be controlling.

The act of Congress under which the railway company selected this land, after providing for the relinquishment of lands claimed by settlers located within a prior grant, permits a railway company to select,

"* * * an equal quantity of non-mineral public lands, so classified as non-mineral at the time of actual government survey which has been or shall be made, of the United States not reserved and to which no adverse right or claim shall have attached or have been initiated at the time of the making of such selection, lying within any state in which or through which the railway owned by [fol. 467] said railway company runs, to the extent of the lands so relinquished and released."

Since it must be conceded that the acts of Tincker and Smithey were not sufficient to initiate a bona fide settlement under the homestead law, the question immediately presented is, were such acts sufficient to initiate a valid claim to vacant and unsurveyed government lands; and if not, under the terms of the act above quoted, was the initiation of the claim, invalid at the time of the railway company's selection, but, which might become valid by the subsequent acts of the claimant, sufficient to prevent the rights of the railway company from attaching?

The right of one seeking to obtain title by compliance with the homestead law to initiate a valid claim to unsurveyed lands has long been recognized. In the statutes, official circulars, and decisions of the courts, various terms are used to describe the acts essential to initiate—such as "occupancy," "placing improvements upon the land or establishing residence thereon," "settlement," and the like; but no authority is called to our attention which squarely holds that the initiatory act must be identical with the actual residence required by the homestead law. The conditions are so different that it would seem that the same rule could not apply. When the land has been surveyed and is open to immediate entry, the settler has a certainty of obtaining title to that which he selects, and a failure to take up actual residence on the land shows a lack of good faith. In the case of unsurveyed lands, there is no certainty as to when an actual entry can be made, nor as to where the lines, when surveyed, will run, and one might, at considerable labor and expense, erect a dwelling for his family and provide other necessities and improvements vitally essential to actual residence, only to find when the survey was made that his improvements were without the lines of the particular tract which he claimed and desired to enter. For these and many other obvious reasons, it would seem that the rule should be greatly relaxed when applied to the intiation of a valid claim to unsurveyed lands, and that which shows good faith under the particular circumstances should be sufficient.

In Nelson v. Northern Pac. Ry. Co., 188 U. S. 108, a case somewhat akin to this, Mr. Justice Harlan discusses the occupancy of [fol. 468] unsurveyed lands, and though in that case the settler actually resided on the land in dispute, the spirit of the decision seems to lend support to our view as above indicated. We think the case of Great Northern Ry. Co. v. Hower, 236 U. S. 702, distinguishable upon the facts, and therefore not controlling upon this point. Still, as this question is not free from doubt, we may well inquire into the right of the railway company to select this land after an adverse claim, valid or invalid, has been instituted.

Tincker had, in fact, claimed the land prior to the selection by the railway company. His claim was clearly evidenced on the land by his posted notices and improvements. Had the railway company caused a careful investigation to be made, such as the law contemplates, it must have been advised of Tincker's claim, and could not then have truthfully asserted that "no adverse right or claim" had attached. We say could not, because the language of the act is

significant of its purpose. An "adverse right" indicates and describes a valid and subsisting claim, while the addition of the words "or claim" indicates something less, and we think is broad enough to include a claim of any nature. Manifestly it was not the intention of Congress to constitute the railway company the judge of what claims were valid and what invalid, and therefore it extended to the railway company the right to select only those lands over which there could be no controversy.

Surely, if the railway company had disclosed to the Land Department the true facts then existing, i. e., that, at the very time its list was filed, Tincker was upon the land in person, engaged in cutting trails, building a cabin, and the like, with the intention of claiming it as a homestead, its selection would not have been approved, even though it further appeared that thereafter Tincker had not followed up his initiatory acts by making the land his home to the exclusion of one elsewhere. At the most we think, under these circumstances, the railway company might have been permitted to show the abandonment by Tincker, and that would have required a hearing to which Tincker must have been a party. But even this may well be doubted. In Kansas Pac. Ry. Co. v. Dunmeyer, 113 U. S. 629, it is said:

"It is not conceivable that Congress intended to place these parties [fol. 469] as contestants for the land, with the right in each to require proof from the other of complete performance of its obligation. Least of all is to be supposed that it was intended to raise up, in antagonism to all the actual settlers on the soil, whom it had invited to its occupation, this great corporation, with an interest to defeat the ir claims, and to come between them and the government as to the performance of their obligations.

"The reasonable purpose of the government undoubtedly is that which it expressed, namely, while we are giving liberally to the railroad company, we do not give any lands we have already sold, or to which, according to our laws, we have permitted a pre-emption or homestead right to attach. No right to such land passes by this grant."

In the case of St. Paul, M. & M. Ry. Co. v. Donohue, 210 U. S. 21, speaking of a situation similar to the one now under consideration, where the claimant was in possession when the railway company filed its list, which list was, by reason thereof, rejected or suspended, and thereafter the claimant relinquished, and it was thereupon contended that, upon the filing of the relinquishment, the railway company's suspended selection should attach, it was said:

"When the selection and supplementary selection of the railway company was made the land was segregated from the public domain and was not subject to entry by the railway company." Citing cases.

And those words, we think are equally applicable here. See also Hastings & D. Rd. Co. v. Whitney, 132 U. S. 357; Whitney v. Taylor, 158 U. S. 85; Northern Pac. R. Co. v. Trodick, 221 U. S. 208, and United States v. Great Northern R. Co., 254 Fed. 522.

Many other points are raised, some of which, in view of the conclusions already reached, it is unnecessary to discuss or decide. Others, apparently, are advanced with less seriousness. In view of our holding that a claim had attached prior to the filing of the railway company's list, that the attaching of that claim withdrew the land from the purview of the act under which the railway company claims, and its selection was, therefore, ineffectual for any purpose; that the subsequent default, if there was default, on the part of Tincker and Smithey, did not inure to the benefit of the railway company; and that, therefore, the land was open and subject to homestead claim when Reed actually settled thereon, and when he made [fol. 470] entry therefor, we deem these points not well taken and not of sufficient importance to warrant further prolongation of this opinion.

For the reasons given the judgment is affirmed.

Tolman, J.

Main, C. J., Holcomb, and Parker, JJ., concur.

[fol. 471] [File endorsement omitted]

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

[Title omitted]

PETITION FOR REHEARING EN BANC—Filed September 22, 1923

The appellant respectfully petitions the court to grant a rehearing and reargument of this case en banc, and as grounds for said petition respectfully shows:

I

The court has disposed of the case upon federal questions. While the opinion is decisive, it has the concurrence of only four of the judges—less than a majority of the court. Since the appellant intends to take the case to the Supreme Court of the United States it is deemed that due consideration both to that court and this requires the submission of the federal questions involved to the full bench of this court before its opinion becomes final.

II

Before the entry of the judgment below, the trial court was requested to enter the following conclusions of law:

1. No adverse right or claim had been attached or been initiated to said southwest quarter of the northwest quarter of said section three (3) township thirty-nine (39) range six (6) E. W. M. at the time of the making of the selection of said land by the St. Paul, [fol. 472] Minneapolis & Manitoba Railway Company on May 5, 1902, but said land was then vacant and unappropriated land of the United States and not interdicted mineral or reserved land, and was

of the character contemplated by and subject to selection under the Act of Congress approved August 5, 1892, entitled "An Act for the Relief of Settlers upon Certain Lands in the States of North Dakota and South Dakota."

2. The acts of Tincker did not initiate any right or claim which exempted the land from selection by the railway company under the said Act of Congress, approved August 5, 1892, and no settlement upon said land was ever made by Tincker under the homestead laws of the United States. (Ab. 170-174.)

Due exception was taken to the refusal of these conclusions (Ab. 175) and error in this respect was claimed in the seventeenth and eighteenth assignments of error in the appellant's opening brief. The point was argued on pages 26 to 53 of the opening brief, and it is not the purpose of this petition to reiterate the contentions there advanced. The departmental opinion, holding that the land was not open to selection by the railway company, proceeded upon the following reasoning:

First. It sets out the conceded fact that Tincker never resided upon or cultivated the land in controversy, but maintained a home elsewhere during the entire period of his asserted claim. And it sets out the facts that his sole possessory acts consisted simply of blazing a line around the land, posting notice that he claimed it as a homestead, blazing a trail from the Nooksack River to the north boundary of his claim, and placing a few poles as the foundation for a cabin, which he did not complete. The opinion also shows that for more than four years subsequent to the performance of the acts just mentioned, Tincker did not visit the land more than once or twice a year—and then usually while on hunting trips—and that he continuously maintained his home and family elsewhere.

Second. The opinion concedes, as a matter of law, "that the acts of Tincker * * * were not sufficient to initiate a bona fide [fol. 473] settlement under the homestead law."

Third. It holds that residence is not required to initiate a homestead claim to unsurveyed lands, although conceding that "this question is not free from doubt."

Fourth. It holds that "a claim of any nature" whether valid or invalid, exempts public land from selection by the railway company under the act of August 5, 1892, quoted in the opinion.

It is respectfully submitted that when the court concluded that the acts of Tincker were not sufficient to initiate a bona fide settlement under the homestead law, a decree for the appellant should have followed. It is only by virtue of the act of May 14, 1880 (U. S. Compiled Statutes, 1916, Secs. 4536 et seq.) that homestead settlements are permitted to be made upon unsurveyed public lands. That act provides that when one has settled upon public lands with the intention of claiming the same under the homestead laws "his rights shall relate back to the date of settlement." Since Tincker never made a bona fide settlement, as the court has held, obviously there

is no "date of settlement" within the meaning of the Act of May 14, 1880, to which his rights can be related back. Since he made no settlement he initiated no claim, valid or invalid, and his sporadic and fugitive acts, indicating merely the possibility of settlement, but never in fact followed by residence upon the land, did not, we submit, initiate an adverse right or claim within the meaning of the homestead laws, and particularly the act of August 5, 1892.

The holding that a valid homestead claim to unsurveyed lands may be initiated, without actual residence thereon, can not be reconciled with the decision of the Supreme Court of the United States in Great Northern v. Hower, 236 U. S. 702, cited in the briefs, and mentioned in the opinion. The department has said it considers this [fol. 474] case distinguishable upon the facts, but we submit that the full court should have an opportunity to determine whether that case is not in fact controlling here.

In that case the homesteader had built a barn, constructed a trail and posted notice of his claim on the land in controversy, and in addition had established his residence only a quarter of a mile away, in the honest belief that he was living upon the land he claimed. The court held that notwithstanding his effort to reside upon the land, his failure to do so left him without support for his claim of title. It said it could not "sanction such a liberal treatment of the statutory requirements as to residence" as would be necessary in order to support title. Consequently, the railway company, contesting with the homestead claimant under the identical statute involved here, prevailed. It seems apparent that the homesteader in that case had done far more than Tincker claims to have done here. Tincker never lived within miles of this land, nor made any effort to live upon it, while the homesteader in the Hower case made a bona fide effort to establish residence, but failed through a mistake of location. To us it seems impossible to distinguish that case from the present.

The holding that "a claim of any nature" to public lands, whether valid or invalid, will withdraw them from the possibility of selection by a railway company under a land grant similar to that involved here, will not withstand a moment's logical consideration. If the departmental opinion is correct, then a Chinaman or other alien, incompetent under our statutes to become a citizen, may, nevertheless, post notice upon the public domain of a homestead claim, and withdraw the land so posted from selection by the railway company; or one already owning more than 160 acres of land, and therefore not entitled to exercise the homestead privilege, may nevertheless assert a claim to public land, which though utterly invalid, will similarly [fol. 475] curtail the rights of a railway company. Again, the claimant under the homestead law of a quarter section of land—the limit of the homestead right—may post notices on adjoining quarters sections that he claims them also, and thus put them beyond the range of selection by some railway company, within whose land grant they would otherwise properly fall.

These examples demonstrate the consequences of a holding that any claim, valid or invalid, once asserted to the public land, immedi-

ately withdraws such land from the possibility of selection by a railway company.

Congress certainly did not intend any such rule when it enacted that the land selectable must be that "to which no adverse right or claim shall have attached or have been initiated at the time of making such selection." By the plain language of that statute a claim must be adverse, and it must have been initiated at the time of the railway company's selection, in order to except the land from the railroad grant. This does not include purely fictitious or merely colorable claims, nor does it include claims contemplated, but never initiated.

There are no additional authorities on these points to cite in addition to those already cited in the briefs, and therefore the only request that can be made is that the appellant be given the opportunity to submit those authorities and the arguments based upon them to the full bench of this court.

III

One of the federal questions presented in the briefs has had such brief notice by the court that we are constrained to urge its further consideration by the full bench. At page 53 of the appellant's opening brief the following proposition was advanced: "assuming that a claim had been initiated by Tincker prior to the filing of the selection list, it had lapsed and permitted the selection to attach long prior to the entry by Reed." The point was then discussed with [fol. 476] exhaustive reference to the authorities on pages 53 to 87 of the brief. In the final paragraphs of the opinion the court seems to hold that the default of Tincker and Smithey in failing to effect settlement upon their claims could not "inure to the benefit of the railway company;" or, in other words, did not have the effect of permitting the then pending selection of the railway company to attach to the land thus abandoned by the homestead claimants. In support of the department's view St. Paul, Minn. & Manitoba Railway Co. v. Donohue, 210 U. S. 21, is cited, and that case is said to have dealt with "a situation similar to the one now under consideration." But, as pointed out in the opening brief, (pp. 82-85), the Donohue case dealt not with abandonment by the original claimant, but with relinquishment from the original claimant to a successor. It was held that a land office decision refusing recognition to the succeeding claimant's entry and awarding priority to the railway company "disregarded the statutory right * * * to relinquish * * * conferred by the first section of the act of May 14, 1880." In the present case there was no relinquishment, and could be none, for a claimant can relinquish an entry only after placing it of record in the land office and of course Tincker's claim was never placed of record in the land office. The Donohue case is therefore not in point.

It can not be doubted that when Tincker for the period of four and one-half years between 1902 and 1906, never visited this land except on hunting trips, never attempted to establish residence there,

but continuously maintained his home elsewhere, and never took a step toward cultivation or improvement of the land, he displayed an intention to abandon as clearly as his expressed declaration to that effect could have shown. Conceding that Tincker had initiated a claim (which we deny) it is, we believe, demonstrated by the authorities cited in the original briefs that after the claim of Tincker lapsed by abandonment, the pending but then unapproved selection list [fol. 477] of the railway company immediately attached to the land and withdrew it from subsequent entry by either Smithey or Reed.

We concede that no additional arguments on this point can be made or further authorities cited than those already submitted in the original briefs to the department of the court which has decided the case, but in view of the importance of the question and the fact that it is a federal one, we respectfully request that it be considered by the full bench upon rehearing in advance of its submission by either of the parties to the Supreme Court of the United States.

Regardless of the disposition of the foregoing petition, we request the court to correct one or two errors of statement in the opinion. At about the middle of the second typewritten page of the opinion the court says "The northwest quarter of the northwest quarter * * * is the subject of this action." The court will note from the complaint (Abs. 28) that it is the southwest quarter of the northwest quarter which is in controversy. Since it is conceded that the improvements of Tincker were entirely upon the northwest quarter of the northwest quarter of the section, whereas the claim of the railway company was made only to the southwest quarter of the northwest quarter of the section, the court will perceive the importance of a correct description of the land in controversy, and we have no doubt that it will make this correction in the opinion.

In the same connection it is mentioned towards the top of the second typewritten page of the opinion that Tincker "laid some poles or logs as a foundation for a cabin, which he did not complete," etc. The court has here failed to mention that this work was done on the northwest quarter of the northwest quarter of the section (St. 29-30, Abs. 72), and was consequently not located upon the land in con- [fol. 478] troversy. It would be but just to the appellant for the court to state the undisputed location of this cabin foundation as it appears in the record. The Supreme Court of the United States is always loath to investigate questions of fact, and since a statement of the true and undisputed location of this cabin is deemed important by the appellant as a part of the basis of the review of the case by the Supreme Court of the United States, we trust that we may with propriety request the court to eliminate any uncertainty on this score by stating in its opinion that this cabin foundation was laid upon the northwest quarter of the northwest quarter of the section, being the forty-acre subdivision to the north of that in controversy.

The court's omission to note the true location of this cabin foundation has resulted in another error. At the foot of page 7 of the typewritten opinion the court, in the course of the legal discussion, says that "at the very time its (the railway company's) list was filed, Tincker was upon the land in person, engaged in cutting trails,

building a cabin and the like." This is without foundation in two respects: First, as already stated, Tincker's cabin foundation was not upon this land, and his trail extended only to the north boundary of the 40-acre tract of this land. (St. 28-30 Abs. 72.) When it is admitted by all parties and witnesses that this cabin foundation and trail did not come within approximately a quarter of a mile of the southwest quarter of the northwest quarter of the section (the land in controversy), we are certain that the court will not embarrass us in the Federal Supreme Court by stating the facts in a different manner than either of the parties contends or claims. The second reason why it is incorrect for the court to say that "at the very time the list was filed Tincker was upon the land in person" is that Tincker places the time of his visit to the land in 1902 very indefinitely as "sometime between February and May, 1902" (St. 27-28 Abs. 68-72). When Tincker himself is uncertain within the [fol. 479] range of four months as to the time of his visit to the land in the spring of 1902, it is hardly correct for the court to say that "at the very time" the railway company filed its selection list (May 5, 1902), Tincker was upon the land. We have no doubt this statement was inadvertent, since the court in its preliminary statement of facts mentions at the top of page 2 of the typewritten opinion that Tincker was upon the land "sometime between February and May, 1902," thus recognizing that the definite time of his visit can not be found even in his own testimony. For these reasons we believe the court should not leave any ground for confusion in the record, but should correct this erroneous, though inadvertent, statement of the evidence.

Although we have been constrained to call attention to these inaccuracies in the court's outline of the facts, we are at the same time aware that the court has been at pains to state the facts and determine the law with studied care and clearness. The painstaking effort of the court in this respect is fully appreciated, and the suggestions contained in this petition are not submitted in any spirit of criticism, but simply with a view of obtaining an unexceptionable outline of the facts in the opinion of this court, so that when that opinion is submitted to the Supreme Court of the United States it may be re-examined on questions of law alone, without any uncertainty either on the part of this court or that concerning the evidence upon which the law of the case is based.

Respectfully submitted, Thomas Balmer, Edwin C. Matthias, Attorneys for Appellant

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[fol. 480] IN THE SUPREME COURT OF WASHINGTON

[Title omitted]

ORDER GRANTING REHEARING EN BANC—Filed October 26, 1923

The court having considered the petition of the appellant for a rehearing En Banc of this cause:

It is ordered that the said petition be and the same hereby is granted;

And it is further ordered that the cause be set for rehearing En Banc during the January term, 1924.

By the Court:

(Signed) John F. Main, Judge.

[File endorsement omitted.]

[fol. 481] IN THE SUPREME COURT OF WASHINGTON

[Title omitted]

PER CURIAM OPINION—Filed Feb. 15th, 1924

Per CURIAM: Upon a rehearing En Banc a majority of the court adhere to the opinion heretofore filed herein and reported in 26 Wash. Dec. 305, 218 Pac. 210, and for the reasons therein given the judgment is affirmed.

[fol. 482] (Copy)

IN THE SUPREME COURT OF THE STATE OF WASHINGTON, JANUARY SESSION, A. D. 1924

Be it remembered, That at a regular session of the Supreme Court of the State of Washington begun and holden at Olympia on the second Monday of January, A. D. 1924, it being the Fourteenth day of said month, among others the following was had and done, to-wit:

Friday, February 15, 1924.

No. 17805

[Title omitted]

JUDGMENT

This cause having been heretofore submitted to the Court upon the transcript of the record of the Superior Court of Whatcom County, and upon the argument of counsel, and the court having fully considered the same, and being fully advised in the premises, it is now, on this 15th day of February, A. D. 1924, on motion of Walter B. Whitcomb Esquire, of counsel for respondents considered, adjudged and decreed, that the judgment of the said Superior Court be, and the same is, hereby affirmed with costs; and that the said Charles W. Reed et al. have and recover of and from the said Great Northern Railway Co. and from National Surety Co. surety the costs

of this action, taxed and allowed at One Hundred & Twenty-Seven & 00/100 Dollars, and that execution issue therefor. And it is further ordered, that this cause be remitted to the said Superior Court for further proceedings, in accordance herewith.

[fol. 483] IN THE SUPREME COURT OF WASHINGTON

[Title omitted]

CLERK'S CERTIFICATE

I, C. S. Reinhart, Clerk of the Supreme Court of the State of Washington, hereby certify that the above and foregoing is a full, true and correct transcript of the record in the above-entitled cause as the same now appears on file in my office, and that I have been requested to certify to the Supreme Court of the United States, and I further certify that attached hereto is a copy of the abstract, appellant's brief, respondents' brief and appellant's reply brief.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court, this 15th day of April, 1924.

C. S. Reinhart, Clerk of the Supreme Court of the State of Washington. (Seal of the Supreme Court, State of Washington.)

IN SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1923

No. 1008

GREAT NORTHERN RAILWAY COMPANY, Petitioner,

vs.

CHARLES W. REED et al.

On Petition for Writ of Certiorari to the Supreme Court of the State of Washington

ORDER ALLOWING PETITION FOR CERTIORARI—Filed June 9, 1924

On consideration of the petition for a writ of certiorari herein to the Supreme Court of the State of Washington, and of the argument of counsel thereupon had,

It is now here ordered by this Court that the said petition be, and the same is hereby, granted, the record already on file as an exhibit to the petition to stand as a return to the writ.

Supreme Court of the United States

OCTOBER TERM, 1925

No. 57

GREAT NORTHERN RAILWAY COMPANY, a corporation, Petitioner

vs.

CHARLES W. REED and DORA REED, his wife, Respondents

CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

Brief of Petitioner

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Supreme Court of the United States

OCTOBER TERM, 1925

No. 57

GREAT NORTHERN RAILWAY COMPANY, a corporation, Petitioner

vs.

CHARLES W. REED and DORA REED, his wife, Respondents

CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

Brief of Petitioner

STATEMENT OF THE CASE

This action was commenced by the respondents in the Superior Court of the State of Washington for Whatcom County to have the petitioner declared trustee for the respondents of the legal title to forty acres of timber land in Whatcom County, Washington, described as the Southwest quarter of the Northwest quarter (SW¼ NW¼), Section Three (3),

Township Thirty-nine (39) North, Range Six (6) E. W. M., Whatcom County, Washington, to enforce conveyance of the legal title and to have the title quieted as against the claim of the petitioner.

The land was selected by the Railway Company on May 5th, 1902, and patented to it on April 13th, 1908. The complaint alleged that the issuance of this patent was induced by fraud and mistake of fact, in that it was procured by the Railway Company upon representations that the land at the time of its selection was vacant and unoccupied public land of the United States, when, in fact, at the time of the filing of the selection list, one "W. J. Tincker was in the possession and occupancy of the said land and claiming to hold the same as a *bona fide* settler and homesteader." (Tr. p. 5.)

The petitioner filed an answer and cross-complaint, denying these allegations and praying that its own title be quieted. A trial upon these issues resulted in a decree awarding to respondents the relief sought. Upon appeal to the Supreme Court (the highest court of the state) this decree was affirmed by Department No. 2 of that court (126 Wash. 312, 218 Pac. 210). Upon a rehearing en banc a majority of the court adhered to the opinion of the Department, and for the reasons therein given the judgment was af-

firmed. Final judgment to that effect was entered by the state Supreme Court on February 15th, 1924. The case is before this court on a writ of certiorari. 265 U. S. 578.

The land in question, while still unsurveyed, was selected by the St. Paul, Minneapolis & Manitoba Railway Company, predecessor of the petitioner, in a selection list filed in the Seattle Land Office on May 5th, 1902, under the Act of August 5th, 1892 (26 Stat. 390), entitled "An Act for the relief of settlers upon certain lands in the States of North Dakota and South Dakota." That act recited that settlers who had gone upon certain lands granted to the Railway Company in those states were "liable to be ejected" under subsequent construction of the granting act, and provided for the relinquishment by the Railway Company of the title to such lands. In lieu of the land thus relinquished the act granted the Railway Company the right to select "an equal number of non-mineral public lands * * * of the United States, not reserved, and to which no adverse right or claim shall have attached or been initiated at the time of the making of such selection, lying within any state into or through which the railroad owned by the said railway company runs, to the extent of the lands so relinquished and released."

The act of Congress further provided: "That upon filing by the said railway company at the Local Land Office of the Land District in which any tract of land selected in pursuance of this act shall lie, a list describing the tract or tracts selected, and the payment of the fees prescribed by law * * * and the approval of the Secretary of the Interior, he shall cause to be executed in due form of law and delivered to said company a patent of the United States, conveying to it the lands so selected. In case the tract so selected shall at the time of selection be unsurveyed, the list filed by the company in the Local Land Office, shall describe such tract in such manner as to designate the same with a reasonable degree of certainty, and within the period of three months after the lands including any such tract shall have been surveyed, and the plats thereof filed in the Local Land Office, a new selection list shall be filed by said company describing such tract according to survey; and in case such designation, as originally selected and described in the lists filed in the Local Land Office shall not precisely conform with the lines of the final survey, the said company shall be permitted to describe such tract anew, so as to produce such conformity."

In the respondents' complaint it was alleged that in the month of September or October, 1901, one W.

J. Tincker "squatted and settled" upon a quarter section, including the land in question, as a homestead and "that his residence thereon was continuous from his said first settlement down to and including the first day of August, 1906" (Comp., par. 6; Tr. p. 4). It was then alleged that the Railway Company's selection list of May 5th, 1902, was filed "at the time when the said W. J. Tincker was in the possession and occupancy of the said land and claiming to hold the same as a *bona fide* settler and homesteader" (Comp., par. 7; Tr. p. 5). These allegations were followed by the charge that the affidavit accompanying the selection list, declaring that the lands were vacant, unappropriated and of the character contemplated by the act, was false, since at that time the land "was in fact occupied and possessed by the plaintiffs' grantor, W. J. Tincker" (Com., par. 7; Tr. p. 5-6). It was further alleged that Tincker sold his so-called squatter's right to one Walter M. Smithey about August 1st, 1906, for Twenty-five Dollars (Comp., par. 6; Tr. p. 4, 65), and that on November 24th, 1906, Smithey transferred the claim for Fifty Dollars to the respondent, Charles W. Reed, who thereupon took up residence upon the land with his family (Comp., par. 6; Tr. p. 5, 80).

The plat of survey of the township was filed in the local land office on February 6th, 1907, and on that

day the respondent, Charles W. Reed, filed his application to enter the West half of the West half (W½ W½) of the section, including the forty acres in controversy, as a homestead. His application was received, but finally rejected as to the forty acres in controversy because of conflict with the Railway Company's selection (Tr. p. 5, 8). On February 23rd, 1907, the Railway Company, as provided in the Act of Congress, filed a supplemental selection list, describing the tract selected according to survey. (Tr. p. 6.) The land was patented to the Railway Company, without notice to the respondents, on April 13th, 1908 (Tr. p. 7). Petitions filed with the Land Department by the respondents, praying for the cancellation of the patent, were denied (Tr. pp. 8-11). On October 8th, 1915, a suit, praying similar relief to that claimed in the action now under review, was filed by the respondents against the petitioner in the United States District Court for the Western District of Washington, Northern Division. Demurrers to the complaint and amended complaint in that suit were sustained (Tr. p. 270). Respondents—plaintiffs in that suit—failed to plead further after the sustaining of the demurrer to the amended complaint, and on May 14th, 1917, the action was dismissed without prejudice (Tr. p. 277-278). Subsequently the present suit was brought.

It is undisputed that W. J. Tincker, who was designated in the complaint as a "*bona fide* settler and homesteader" at the time the selection list was filed, never in fact settled or resided upon the land, never cultivated an inch of it, and that during the entire period of his so-called claim to this land he maintained his home at Maple Falls, Washington, several miles away, where he resided with his wife and family.

The facts on the subject of Tincker's relationship to the land were stated by the State Supreme Court as follows:

"The facts are not greatly in dispute, so far as material to our present inquiry, and are shown to be substantially as follows: In September or October, 1901, one W. J. Tincker, being duly qualified to enter land under the homestead laws, went upon the Northwest quarter of Section 3, Township 39 North, Range 6 E., W. M., blazed a line around the same, posted notices on the four corners, and claimed the quarter section of land described as his homestead, it being then unsurveyed, vacant government land. He spent but a few hours on the land at that time, and did not go upon it again until some time between February and May, 1902. At that time he blazed a trail from the Nooksack River to the northwest corner of his claim, laid some poles or logs as a foundation for a cabin, which he did not complete; and from 1902 to 1906, Tincker was on his claim on an average of

once or twice a year, usually while on a hunting trip, and at these times he renewed his posted notices.

"During all of this period Tincker was a married man, living with his wife and family at Maple Falls, and there maintaining a home. He did no other work on the land, and neither he nor any member of his family ever actually resided upon or cultivated the land." (Tr. p. 292-293.)

The cabin foundation started by Tincker was on Lot 4, or the Northwest Quarter of the Northwest Quarter, of the Section, being the forty acre tract north of the land in controversy; and the trail ran only to the northwest corner of the Section. (Tr. p. 64.) Consequently no improvement was visible on the Southwest Quarter of the Northwest Quarter of the Section (the land in controversy) at the time of its selection by the Railway Company. Tincker sold his "squatter's right" in August, 1906, for $25.00 to one Smithey, who, after doing some work on the land, transferred his claim for $50.00 to the respondents in November, 1906. (Tr. p. 293.)

Upon these facts, which were not in dispute, either in the trial court or in the Supreme Court of the State, the petitioner stood upon the validity of its patent, and requested in both courts and at all stages the holding contained in the following

SPECIFICATION OF ERRORS

I.

The state courts erred in refusing to adopt the following conclusion of law requested by the petitioner:

No adverse right or claim had attached or been initiated to said southwest quarter of the northwest quarter of said Section Three (3), Township Tirty-nine (39), Range Six (6) E., W. M. at the time of the making of the selection of said land by the St. Paul, Minneapolis & Manitoba Railway Company on May 5, 1902, but said land was then vacant and unappropriated land of the United States and not interdicted mineral or reserved land, and was of the character contemplated by and subject to selection under the Act of Congress approved August 5, 1892, entitled "An Act for the Relief of Settlers upon Certain Lands in the States of North Dakota and South Dakota." (Tr. pp. 26-28.)

II.

The state courts erred in refusing to adopt the following conclusion of law requested by the petitioner:

The acts of Tincker did not initiate any right or claim which exempted the land from selection by the railway company under the said Act of Congress,

approved August 5, 1892, and no settlement upon said land was ever made by Tincker under the homestead laws of the United States. (Tr. pp. 25-28.)

III.

The state courts erred in entering a decree declaring the petitioner to be a trustee holding the legal title to the land in controversy for the use and benefit of the respondents, and quieting the respondents' title to said land. (Tr. pp. 42-45.)

IV.

The state courts erred in refusing to enter a decree quieting the petitioner's title to said land against the claim of the respondents. (Tr. pp. 29-31.)

ARGUMENT

The question of law thus submitted to the state courts and now submitted to this Court is this: Does the posting of notices upon the public domain, followed by the blazing of lines and the placing of a few poles in the form of a square, withdraw the land thus posted from the posibility of selection by a Railway Company under such an Act of Congress as the one involved here, when the one posting the notices never at any time (though pretending to claim the

land for more than four years) establishes residence upon the land or cultivates it in any degree, but constantly maintains a home with his family elsewhere?

I. The decision of the state courts is contrary to the decision of this Court in *Great Northern Railway Company v. Hower*, 236 U. S. 702. That case was cited to the Supreme Court of the State and mentioned in its opinion, but was passed with the mere statement that it was considered distinguishable. In that case a homesteader had built a barn, constructed a trail and posted notices of his claim on the land in controversy, and in addition had established his residence only a quarter of a mile away in the honest, but mistaken, belief that he was living upon the land he claimed. In that case, as in this, the land was unsurveyed at the time of the asserted initiation of the homestead claim. This Court held that, notwithstanding the claimant's effort to reside upon the land, his failure to do so left him without any support for his claim of title, holding that it could not "sanction such a liberal treatment of the statutory requirements as to residence" under the homestead laws as would be necessary in order to support title. Consequently the Railway Company, contesting with the homestead claimant under the identical statute involved here, prevailed. The homesteader in that case had done more than Tincker, the alleged claimant in this case,

had done. Tincker never lived within several miles of this land, nor made any effort to live upon it, while the homesteader in the *Hower* case made a *bona fide* effort to establish residence, but failed through a mistake of location. The cases are not distinguishable.

The State Supreme Court said: "It must be conceded that the acts of Tincker and Smithey were not sufficient to initiate a *bona fide* settlement under the homestead law," but held that a homestead claim to unsurveyed lands may be initiated without residence. This holding is contrary to the homestead laws. It is only by virtue of the Act of May 14th, 1880 (U. S. Comp. Stat. 1916, Sections 4536 *et seq.*) that homestead settlements are permitted to be made upon unsurveyed public lands. That Act provides that when one has settled upon public lands with the intention of claiming the same under the homestead laws, "his rights shall relate back to *the date of settlement.*"

This Court in *St. Paul. M. & M. R. Co. v. Donohue*, 210 U. S. 21, said that by this act, for the first time, "both as to surveyed and unsurveyed public lands, the right of the homestead settler was allowed to be initiated by and to arise from *the act of settlement.*"

And in *Great Northern R. Co. v. Hower*, 236 U. S. 702, *supra*, there was an unqualified holding that,

even as to unsurveyed lands, no homestead claim can be initiated except by "actual residence." The court in that case said:

"The statute of the United States (Rev. Stat. Sec. 2291) is specific in its requirements that, in order to obtain a patent for a homestead, the applicant must have actually resided upon or cultivated the same for a term of five years succeeding the filing of the claim, etc. The question, therefore, is, was an actual residence within the meaning of the statute sufficiently shown to comply with these provisions? * * *

"In this case it appears that the residence was not upon any part of the tract claimed by the homesteader; nor was the residence upon a continguous tract of land, but was entirely separate and apart from the land claimed. Under these circumstances we are constrained to the conclusion that the complaint, upon its face, made a case entitling the plaintiff in error to the relief sought."

Since Tincker concededly never made a *bona fide* settlement there was no "date of settlement" within the meaning of the Act of May 14th, 1880, to which his rights could be related back. Without settlement he could initiate no claim, and his occasional and infrequent visits to the land, indicating merely a possibility of settlement, but never in fact followed by residence or settlement, could not initiate an adverse right or claim within the meaning of the Act of August 5th, 1892.

II. The State Supreme Court, admitting that the foregoing ground of its decision was "not free from doubt," went a step farther, and held that "a claim of any nature," whether valid or invalid, exempts public land from selection by the Railway Company under the Act of August 5th, 1892. Such a rule is one of most serious concern to the petitioner and the other railway companies that have selected, or are entitled to select public land under the Act of August 5th, 1892, and similar laws. If mere speculative claims asserted to public lands without settlement thereon are sufficient to defeat the *bona fide* selections of others, then railway companies are at the mercy of speculators and professional land locators, who have only to procure the posting of notices by anyone upon the public domain in order to preserve the land from railway selection.

No case can be found supporting the decision of the state court, and the cases cited in its opinion are not in point. In *Nelson v. Northern Pacific R. Co.*, 188 U. S. 108, there was occupancy and residence upon the land by the homesteader, commencing three years before the rights of the railway company were fixed. In *Kansas P. R. Co. v. Dunmeyer*, 113 U. S. 629, there was both an entry on file in the land office, and a settlement upon the land, at the time the railway company's map of definite location was filed.

In *St. Paul, M. & M. R. Co. v. Donohue*, 210 U. S. 21, the homestead claimant had "settled upon unsurveyed land" and "had built his residence" thereon two years and eight months before the Railway Company filed its selection list.

In *Hastings & D. R. Co. v. Whitney*, 132 U. S. 357, a soldier's entry of land had been allowed and was on file in the Land Office at the time the railway company filed its map of definite location. In *Whitney v. Taylor*, 158 U. S. 85, there was a preemption entry on file in the Land Office when the map of definite location was filed. In both of these cases the holding was that a mere defect in the formal entry did not render the same a nullity.

In *Northern Pacific R. Co. v. Trodick*, 221 U. S. 208, the situation of the parties was thus described by the court: "The company filed its map of definite location on July 6th, 1883, but one Lemline was then in the actual occupancy of the land as a residence. * * * He continuously resided on the land until his death, which did not occur until 1889."

In *United States v. Great Northern R. Co.*, 254 Fed. 522, there was a finding that in March, 1902 (prior to the filing of the railway company's selection list), a settler had taken up his residence upon the land "and continued to live there for 2 or 2½ years."

It is manifest that none of these decisions lends countenance to the view that a homestead claim can be initiated by any act short of settlement or formal land office entry. On the other hand, the decisions of the Land Department support our contention that the acts of Tincker in the present case did not segregate the land from selection by the railway company.

The following is quoted from *Meyer v. Northern Pacific R. Co.*, 31 L. D. 926:

"Meyer alleges settlement upon this land about two months prior to the filing of the railroad selection list, and it is claimed that said selection was therefore subject to the claim that might ripen under such settlement. As Meyer's claim rested upon settlement made upon unsurveyed land with a view to entry under the homestead laws, it was necessary that he should, in order that such right or claim might be successfully asserted as against an intervening claim, show that he established an actual residence upon the land within a reasonable time after settlement, and that such residence had been maintained to the date of the presentation of his homestead application in furtherance of such claim or right under the settlement as alleged. Failing in this, it must be held that no such right or claim was initiated as served to defeat the railroad's selection."

In *O'Brien v. Chamberlain*, 29 L. D. 218, it was said:

"It has been repeatedly ruled by this Department that a settlement upon public land must be followed

within a reasonable time by actual residence in order to *create* in the claimant any rights thereunder; so that, if it be admitted that Annie O'Brien was, at the time of her alleged purchase of the improvements placed upon this land by her father, duly qualified, and that by such purchase she initiated a right to the land, it must be held in the presence of the adverse claim that such right was waived or lost by her failure to take up a residence upon the land within a reasonable time thereafter. It therefore follows that the rejection of her application by the local officers was proper."

In *Hastings & D. R. Co. v. Grinden*, 27 L. D. 137, it was held that a possessory claim to land and cultivation thereof, unaccompanied by actual residence thereon, will not defeat the right of a railway company to make indemnity selection thereof. The court said:

"The question raised by the appeal is, had the present homestead applicant such a claim to the land on October 29, 1891, the date of the Company's selection, as would bar the allowance of said selection? From the showing made in support of her application it appears that she purchased the improvements upon this land in October, 1889, and she thereafter cultivated the breaking upon the tract, but did not take up a residence on the land until June 1, 1892, more than two and one-half years from the date she took possession of the tract. While under the departmental decisions settlement can be effected without actual residence, the settlement must be followed within a reasonable time by actual residence in order

to claim any rights thereunder. * * * It would seem that if she initiated any right by purchase of the improvements and by her possession and cultivation of this tract, it was waived and lost by her failure to take up a residence upon the tract for the period of two years preceding the Company's selection. It is therefore held that she had no such claim to this tract as would bar its selection on account of the grant.

"A claim of occupancy set up to defeat the right of indemnity selection cannot be recognized if it appears that at the date of selection the alleged occupant had not established residence upon the tract, but was maintaining a home elsewhere, although he may have fenced and cultivated the land and erected buildings thereon."

Banks v. Northern Pacific R. Co., 25 L. D. 542.

These cases were followed in *Elisenson v. Hastings & D. R. Co.*, 28 L. D. 572, where settlement was claimed prior to the railroad's selection by virtue of the purchase of the improvements of a prior settler, and continued improvement of the land, but residence was not commenced until six months after the selection.

In *Northern Pacific R. Co. v. Grimes*, 24 L. D. 452, it was said:

"Examination of the testimony introduced by Grimes fails to show that he had ever lived upon the land or had a place of abode thereon. Grubbing, ditching and fencing, without residence, cannot be deemed

sufficient to except the land from the selection of the railroad companies.

"The occupancy of land for the sole purpose of speculating in the improvements thereon does not constitute a *bona fide* settlement that will except the land from indemnity selections."

Humiston v. Northern Pacific R. Co., 23 L. D. 543.

Settlement is not effected by the arrangement of a few logs in the form of a square.

Barrott v. Linney, 2 L. D. 26.

Wister v. Rowe, 3 L. D. 447.

Fuller v. Clibon, 15 L. D. 231.

The Land Department, it will be seen, has consistently held that a claimant's initial acts of possession must be followed by actual residence within a reasonable time, in order to initiate a homestead claim. That is to say, there can be no settlement without residence. Other decisions defining the word "settlement" give it a similar meaning.

In *Bratton v. Cross*, 22 Kas. 469, construing a statute conferring the right of purchase of school lands upon persons having "settled upon and improved" the land, or who are "actual settlers" thereon, it was said:

"To settle upon land we think means to fix one's place of residence thereon; and a settler upon land is

one who resides thereon. This is in accordance with all the definitions of the words settle, settler, and settlement, when applied to settlements upon land."

This opinion was concurred in by Justice Brewer, afterwards a member of the United States Supreme Court. The court in this case points cut that a *bona fide* settler might, in advance of residence, commence the construction of improvements, which, *if followed by residence*, would cause his rights to date from the first moment of his occupancy. This is in accordance with the decisions of the United States Land Department, cited above, holding that a claim to a homestead, although publicly manifested, is void *ab initio* if not followed within a reasonable time by actual residence.

In *Mosely v. Torrence*, 71 Cal. 318, 12 Pac. 430, the court was called upon to construe a statute of California, permitting the purchase of state lands by "actual settlers thereon." The defendant had never personally resided on the land, but had enclosed it and cultivated portions of it. The court held that he was not entitled to make the purchase, saying "actual settlement means actual residence."

The word "settle," when applied to lands, imports the idea of a permanent habitation, and a settler within the preemption laws of the United States is

one who has actually resided on the land claimed. *Burleson v. Durham*, 46 Texas 152 (citing Webster's Dictionary). See also *Mellen v. Great Western Beet Sugar Co.*, 122 Pac. 30, 21 Idaho 353, Ann. Cases 1913 D, 621.

In *State v. Strain*, -- Tex. Civ. App. --, 25 S. W. 1003, a prospective settler hauled lumber upon state land for the purpose of building a house, camped upon it for several nights, and then, thinking that the State Land Board had lawfully abrogated the requirement that the land be settled within six months, left the land with the intention of returning, but subsequently sold it. It was held that these acts did not constitute a settlement under a state statute requiring settlement as a condition of purchase. The court said:

"To constitute a settlement within the contemplation of the law, the intention to settle must exist, accompanied by such acts as show a consummation of that intention within the period fixed by the statute. If the settlement is once an 'accomplished fact' a subsequent abandonment is immaterial; but if, before the fact is accomplished, the intention to settle is abandoned, it cannot be said that an actual settlement has been effected."

In the recent case of *Bowen v. Hickey*, (Cal. App.), 200 Pac. 46, certiorari denied, 257 U. S. 656, it was held that an entryman does not acquire or maintain a residence by occasional visits or by going upon the

land for the purpose of merely formal compliance with the law, since substantial residence and good faith are necessary.

This review of the authorities justifies the statement that one claiming settlement upon public lands cannot acquire the rights of a settler except by placing his residence there.

In the course of the discussion of the law of the case, the state supreme court injects one misleading statement of fact, saying that "at the very time its (the Railway Company's) list was filed Tincker was on the land in person, engaged in cutting trails, building a cabin, and the like." This statement is incorrect in two respects. First, as already stated, Tincker's cabin foundation and trail were not upon the forty acres selected by the Railway Company, but were on another subdivision, almost a quarter of a mile to the north. Second, Tincker placed the time of his visit to the land when this work was done very indefinitely as "some time between February and May, 1902." (Tr. p. 52). When Tincker himself was uncertain within a range of four months as to the time of his visit to the land, it was hardly correct for the state court to say that he was there and at work on May 5th, 1902, the date the list was filed. The court's statement was no doubt inadvertent, since

the opinion had stated in the preliminary outline of the facts that Tincker was upon the land "sometime between February and May, 1902."

Two timber cruisers who examined the land for the Railway Company in the latter part of April, 1902, found no improvements of any kind upon it (Tr. pp. 121, 127) nor did they find the notices said to have been posted by Tincker on the four corners of his claim the preceding fall. (Tr. pp. 120, 127.)

It is clear from the evidence of the two witnesses just mentioned (Tr. 118-130) that the Railway Company was endeavoring in good faith while selecting its lands to avoid conflict with settlers. No fraud was committed, but if an adverse right or claim had attached or been initiated to the land at the time the Railway Company filed its list, the Railway Company was mistaken in making the selection and was not entitled to the patent. The vital question then is whether or not Tincker had made a settlement on the land within the meaning of the homestead laws prior to the time the selection list was filed. It is respectfully submitted that since the testimony of Tincker himself shows that he never established a residence upon the land, the Railway Company made no mistake in selecting it and its patent should be sustained.

When Congress, in the Act of August 5th, 1892, limited the Railway Company's right of selection to land "to which no adverse right or claim" had "attached or been initiated," it must have meant adverse rights or claims recognized under other Federal land laws. Both the railroad and the settler were objects of the Nation's bounty and encouragement and it was no doubt the congressional purpose to avoid all possible conflicts between them. The Railway Company was not permitted to question the sufficiency of a settler's compliance with the land laws after his initiation of a claim. On the other hand, it could not have been the intent of Congress to allow the rights granted to the Railway Company to be frustrated by merely colorable or speculative claims on the part of settlers evincing no intent to comply with the primary purpose of the land laws—the settlement of the public domain. Those laws were enacted "to secure homesteads to actual settlers upon the public domain." The Act of 1880 (U. S. Compiled Statutes, 1916, Sections 4536 *et seq.*), which first extended the homestead privilege to unsurveyed lands, allowed the right of the settler to arise only from "the act of settlement." *St. Paul M. & M. R. Co. v. Donohue*, 210 U. S. 21. It is admitted in the State Supreme Court's opinion that there was in this case no bona fide homestead settlement upon the land at the time

the selection list was filed. The state court has, however, held that the land was segregated from selection by the posting of notices, the blazing of trails and the arrangement of a few poles in the form of a square. But Tincker, the party performing these acts, did not follow them by settlement or by any effort to establish residence on the land in a period of nearly five years, at the end of which he sold his so-called "squatter's right" to another. If the Railway Company's patent is to be set aside, the decision must rest upon the ground that a homestead right can be initiated without settlement.

In *Tarpey v. Madsen*, 178 U. S. 215, the court referred to the danger of allowing the title of a railway company to be defeated by "fugitive and uncertain testimony of occupation" on the part of some former settler. The danger to the security of titles which must result from the state court's decision in the instant case is manifest. In the State of Washington and other western states a substantial portion of the land titles are deraigned from railroad grants. Are these all subject to be set aside upon the testimony of any roving hunter or trapper who may happen to recall that many years ago he had a fleeting intention of establishing a homestead and had indicated that intention by the posting of notices, the commencement of a cabin or the blazing of a trail—an intention

which he soon forgot or abandoned? A holding of this kind goes far beyond the purpose announced in the homestead laws of securing homesteads "to actual settlers upon the public domain."

Respectfully submitted,

F. G. DORETY,
THOMAS BALMER,
EDWIN C. MATTHIAS,
Solicitors for Petitioner.

Supreme Court of the United States

OCTOBER TERM, 1925

No. 57

GREAT NORTHERN RAILWAY COMPANY, a corporation, Petitioner

vs.

CHARLES W. REED and DORA REED, his wife, Respondents

CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

Brief of Respondents

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Brief of Respondents

STATEMENT OF THE CASE

This action involves the title to the Southwest quarter of the Northwest quarter of Section Three, Township Thirty-nine, Range Six East, Whatcom County. It is the contention of the respondents that W. J. Tincker, a duly qualified homesteader, entered upon this land in September or October, 1901, with the purpose and intention of holding the same as a homestead under the law of the United States. It is admitted that the land was, at that time, unsurveyed, unappropriated land of the United States, subject to settlement under the homestead laws.

Respondents further claim that Tincker held this

land until about August 1, 1906, when he conveyed and relinquished all his right to the land and improvements thereon to Walter M. Smithey; that Smithey entered upon the land, occupied the same, made improvements and continued to hold it for the purpose of claiming it for a homestead until November 24, 1906, when he sold, conveyed and relinquished all his right to the land and to the improvements thereon to the respondent, Reed, who immediately entered upon the land, took possession of it and has resided upon it ever since.

While the land was so claimed and occupied a patent therefor dated April 13, 1908, was issued by the Government to the appellant, St. Paul M. &. M. Railway Company, to whose rights, if any, the appellant, the Great Northern Railway Company, has succeeded. The respondents, by this action ask judgment, that the petitioners be decreed to be the holder of the legal title to the said land in trust for respondents and also that the title to the said property be quieted in respondents. The respondents' contention has a double aspect: First, they claim that the appellants acquired title by fraud and hold the title as trustee *ex maleficio* for respondents. Second, that the respondents have acquired title to the land by adverse possession.

The petitioner filed an answer and cross-complaint

denying the allegations and praying that its own title be quieted. The trial upon these issues resulted in a decree according to respondents the relief sought. Upon appeal to the Supreme Court, this decree was affirmed by the Supreme Court of Washington. (*Reed v. Great Northern R. Co.*, 126 Wash. 312.) On a rehearing *en banc* the Court adhered to the opinion of the Department, and for the reasons therein given, the judgment was affirmed.

ARGUMENT

APPELLANTS HOLD TITLE IN TRUST FOR RESPONDENTS

There is not a great deal that we can add by way of either statement of fact, citation of authorities or argument to what is contained in the decision of this case by the Supreme Court of the State, or in the findings of fact or decision of the lower Court. It may be possible, however, for us to render some assistance by pointing out the manner in which we arrive at the conclusion that the petitioner holds the title in trust for the respondents.

The petitioner acquired legal title to the land under

an Act of Congress of August 5, 1922, (27 Statutes 390) entitled: "An Act for Relief of Settlers on Certain Lands in the States of North and South Dakota." Under this Act the petitioner was permitted to select in lieu of other lands "an equal quantity of non-mineral public lands, so classified as non-mineral at the time of actual Government survey which has been or shall be made, of the United States, not reserved and *to which no adverse right or claim shall have attached or have been initiated* at the time of making such selection." The Act then provides that the Railway Company shall file in the local Land Office a list of lands selected. The material part of this Statute so far as this case is concerned is that the lands subject to selection must be lands "to which no adverse right or claim shall have attached or have been initiated at the time of making such selection." Respondents claim that an adverse right or claim had attached or had been initiated at the time the petitioner made its selection. The selection list was filed on May 2, 1902, and was supported by the affidavit of Mr. Thomas R. Benton dated March 22, 1902, wherein he stated that the lands "are vacant, and unappropriated and are not indicated mineral nor reserve lands and of character contemplated by said Act." (Transcript page 5, 6 and 15).

The petitioner has assigned errors as follows only:

1. In refusing to adopt conclusion of law requested by the petitioner that no adverse right or claim had attached or been initiated at the time of making this selection.

2. In refusing to adopt conclusion of law requested by the petitioner that the acts of Tincker did not initiate any right or claim which exempted the land from selection.

3. In entering a decree declaring petitioner to be trustee holding the legal title to the land for the use and benefit of respondents.

4. In refusing to enter a decree quieting petitioner's title. (Petitioner's Brief pages 9 and 10.)

These are the only assignments of error, consequently the facts as found by the lower Court are unquestioned and to be taken as true, and the only question is whether the conclusions of law are supported by the findings of fact, and whether the decree is supported by the findings of fact and conclusions of law.

Findings of facts Nos. 7 and 8 are as follows:

VII.

"That in the month of September or October, 1901, the Southwest quarter (SW¼) of the Northwest quar-

ter (NW¼) of Section Three (3) Township Thirty-nine (39), North of Range Six (6) East of the Willamette Meridian, Whatcom County, State of Washington, was unappropriated public lands of the United States, subject to settlement, entry and patent under the Homestead Laws of the United States; that in the month of September or October, 1901, the said W. J. Tincker squatted and settled upon the Northwest quarter (NW¼) of Section Three (3), Township Thirty-nine (39), North of Range Six (6) East of Willamette Meridian, including the said Southwest quarter (SW¼) of the Northwest quarter (NW¼) of the said Section Three (3), which said land was at that time unsurveyed; that he settled and squatted upon the said land with the purpose and intention of holding the same as a homestead under the laws of the United States, and of filing and perfecting his title thereto under the said laws; that in pursuance of said intention and in compliance with the laws of the United States in such case made and provided, he posted notices of his rights and claims to the said land upon the same. That between the first day of February, 1902, and the first day of April, 1902, the said W. J. Tincker continued his settlement of said land and went thereon and blazed some trails and cut poles and laid the foundation for a cabin upon said land.

VIII.

"That on the 18th day of December, 1902, the said land with other land, was by order of the Department of the Interior "withdrawn from settlement, entry, sale, or other disposal pending determination as to the

advisability of including such lands within the Washington Forest reserve," and by order of September 20th, 1904, the land was released from said temporary withdrawal "and restored to settlement, but provided that the land so released from withdrawal and restored to settlement shall not be subject to entry, filing or selection under the public lands until after ninety (90) days' notice by such publication as the Land Office may prescribe." And that it was not so thrown open until February 6th, 1907; that thereafter and up to August, 1906, when he transferred his rights to Smithey, Tincker continued to claim the land as his homestead, under his right thereto by settlement and went upon the land at least once each year and renewed and kept continuously posted his notices of settlement and claim to the land as homesteader. During said time said Tincker was a married man and maintained a home at the village of Maple Falls, near by, where he, with his wife and children, lived."

Finding of Fact No. 9 is that Tincker relinquished and conveyed his interest to Smithey, and that Smithey posted notices and made improvements.

Findings of Fact. Nos. 10 and 11 and a portion of No. 12 are as follows:

X.

"That on or about the 24th day of November, 1906, the said Walter M. Smithey sold, conveyed and relinquished all his rights, title, claim and interest in and to the Southwest quarter (SW1/4) of the Northwest

quarter (NW¼) and the Northwest quarter (NW¼) of the Northwest quarter (NW¼) (also known as Lot four) of said Section Three (3) and all improvements therein to the plaintiff, Charles W. Reed, who immediately thereupon, entered, settled and squatted upon the Southwest quarter (SW¼) of the Northwest quarter (NW¼) and the said Lot Four (4), and the West half (W½) of the Southwest quarter (SW¼) of said Section three (3), with the purpose and intention of becoming a homesteader, thereby claiming the same as a homestead, under the laws of the United States, and of filing upon and entering the same as such and of perfecting his title thereto; that he has continuously occupied the land since said time and has resided thereon with his family continuously since about March 1st, 1907; that in the month of November, 1906, the said plaintiff, Charles W. Reed, began the construction of a house upon the said Lot Four (4) (Northwest quarter of the Northwest quarter) which was contiguous to the said Southwest quarter (SW¼) of the Northwest quarter (NW¼) of said Section three (3), and a part of the land claimed by plaintiff as a homestead, and shortly thereafter completed the same and ever since said time has occupied, cultivated and made his home upon the land claimed by him as a homestead including the land here in question, with the purpose and intention of claiming all of the same as a homestead under the laws of the United States, and he has never relinquished, forfeited or surrendered his rights thereto. That in November, 1906, said Reed removed the notices posted on said land by said Smithey and replaced the same with notices of his own to the effect that he claimed the said land as a homestead and has kept said notices continuously posted.

XI.

"That a plat of Survey of Township Thirty-nine (39) North, Range Six East (6E), Willamette Meridian, of the land District of Seattle, Washington, was filed in the local land office on February 6, 1907; that prior to the filing of the said Plat, and on May 5, 1902, and at the time when the said W. J. Tincker was in the possession and occupancy of the said land, and claiming to hold the same as a bona fide settler and homesteader, the said defendant, St. Paul, Minneapolis & Manitoba Railway Company filed its List 43 (now Serial 024450) describing a tract of land which it claimed would be described when surveyed as the Southwest quarter (SW¼) of the Northwest quarter (NW¼) of said Section Three (3), in said township and range, under an Act of Congress of August 5, 1892, 27 Statutes 390, entitled: "An Act for Relief of Settlers on Certain Lands in the States of North and South Dakota," and on June 21, 1902, the said St. Paul, Minneapolis & Manitoba Railway Company filed in said Land Office a re-arranged list describing the same land; that accompanying the said original List No. 43 and the re-arranged list above mentioned was the affidavit of Mr. Thomas R. Benton, in support thereof, executed in Ramsey County, Minnesota, on March 22, 1902, in which it is alleged that the said lands "are vacant, unappropriated and are not indicated mineral nor reserve lands, and of character contemplated by said act;" that the said affidavit was untrue and false at the time when the same was made and at the time when the said list was filed, and at all times thereafter in the following particular, to-wit: that

the said land was not vacant and was not unappropriated at said times, but was, in fact, occupied and possessed by the plaintiff's grantor, W. J. Tincker, and had been appropriated by him for the purposes hereinabove mentioned; that thereafter, on February 23, 1907, subsequent to the filing of the Plat of Survey hereinabove mentioned, the said St. Paul, Minneapolis & Manitoba Railway Company filed a Supplemental List 43-A, accompanied by another affidavit of Mr. Benton, to the same effect, and alleging therein that at the time, to-wit: February 23, 1907, the said lands were still vacant and unappropriated; and that this affidavit also was false and untrue in that the said lands were not vacant and unappropriated but were at that time actually occupied, and in the possession of, claimed and appropriated by the plaintiff, Charles W. Reed, as hereinabove mentioned.

XII.

"That on February 6th, 1907, the plaintiff, Charles W. Reed, filed in the Land Office at Seattle, Washington, his application to enter the said Southwest quarter (SW¼) of the Northwest quarter (NW¼) and the said Lot Four (4) and the West half (W½) of the Southwest quarter (SW¼) of said Section Three (3), as and for a homestead, which said application was received by the Register and Receiver of the said Seattle Land Office, without objection, and the said plaintiff was not informed by the said Register or Receiver, nor by anyone else, that the said land had been selected by the said St. Paul, Minneapolis & Manitoba Railway Company, nor had he any knowl-

edge or notice thereof at that time nor at any time thereafter until December 1st, 1909."

Transcript pages 32-35.

The remainder of the findings of fact are principally historical and material as showing the error of the Land Office, the failure to give respondents an opportunity to contest, and the correctness of the proceedure followed in this case.

The material question is, was the land in question segregated from the public domain at the time the petitioner filed its selection list.

Let it be especially noted that the Court found in Finding No. 11, transcript page 34, that prior to the filing of the said Plat, and on May 5, 1902, at the time when the said W. J. Tincker was in the possession and occupancy of the said land and claiming to hold the same as a *bona fide* settler and homesteader, the said defendant (petitioner) filed its List 43.

The settler Tincker testified that: "About March as near as I can get it—between February and May—I went up and blazed a trail across the land and laid a foundation for a cabin." Transcript page 52. This was uncontradicted. The affidavit of Mr. Benton was made in March and the list was filed May 5, so at the

very time the list was made, Tincker was on the land making improvements.

The main issues of this case are determined by the case of *St. Paul M. & M. R. Co. vs. Donohue,* 210 U. S. 21. In that case one Hickey settled upon unsurveyed land. Thereafter the railroad company, under the same Act involved in the case at bar, filed a selection list. Hickey died, and his heir filed a relinquishment in the Land Office. Donohue then filed on the land under the Timber and Stone Act. The railway company claimed that upon the relinquishment of Hickey's heir, the property vested in it under its selection list. In the opinion of Mr. Justice White, it is said:

"The railway company was confined in its selection of indemnity lands to lands non-mineral and not reserved, 'and to which no adverse right or claim shall have attached or have been initiated at the time of the making of such selection. * * * When the selection and supplementary selection of the railway company was made, the land was segregated from the public domain, and was not subject to entry by the railway company. *Hastings & D. R. Co. vs. Whitney,* 132 U. S. 357, 33 L. ed. 363, 10 Sup. Ct. Rep. 112; *Whitney vs. Taylor,* 158 U. S. 85, 39 L. ed. 906, 15 Sup. Ct. Rep. 796; *Oregon & C. R. Co. vs. United States,* 190 U. S. 186, 47 L. ed. 1012, 23 Sup. Ct. Rep. 673."

St. Paul M. & M. R. Co. vs. Donohue, 210 U. S. 21.

The petitioner in its brief, page 10, says that the question of law submitted to this Court is, does the posting of notices upon the public domain, followed by the blazing of lines and placing of a few poles in the form of a square, withdraw the land thus posted from the possibility of selection by railway companies under such an Act of Congress as the one involved here, when the one posting the notices never at any time, though pretending to claim the land for more than four years, established his residence on the land or cultivated it to any degree, and constantly maintained a home with his family elsewhere. We will undertake to try to answer this question. In the first place, the statement of the facts is not quite exact. We have quoted above the findings of fact which are not questioned here. They are supported by the evidence, but that we will not quote.

Government Circular No. 541, Department of the Interior, General Land Office, entitled: "Suggestions to Homesteaders, Etc.," approved April 6, 1917, on page 4 under the heading "How Claims Under the Homestead Law Originate," reads as follows:

"3-A. Claims under homestead laws may be initiated either by settlement on surveyed or unsurveyed lands of the kind mentioned in the foregoing paragraph or by the filing of a soldier's or sailor's declara-

tory statement or by the presentation of an application to enter any surveyed lands of the kind.

"4-A. Settlement is initiated through the personal act of a settler placing improvements on the land or establishing a residence thereon. He thus gains the right to make entry on the land as against other persons. A settlement on any part of a surveyed quarter section subject to homestead entry gives the right to enter all of that quarter section. * * * When settlement is made on unsurveyed lands, the settler must plainly mark the boundaries of all land claimed. Within a reasonable time after settlement, actual residence must be established on the land and continuously maintained. Entry should be made within three months after settlement on the surveyed lands, or within that time after the filing in the local Land Office of the Plat of Survey of lands unsurveyed when survey was made, otherwise the preference right of entry will be lost."

(Transcript p. 216).

The land was unsurveyed. The Findings of the Court show that it was withdrawn from entry soon after settlement. It shows that filing thereon was made the day that it was opened to filing.

That a claim for homestead may be initiated by settlement is well settled by the decisions of this Court. *Nelson vs. Northern Pacific R. Co.* 188 U. S. 108; *Northern Pacific R. Co. vs. Trodick,* 221 U. S. 208.

We think the following is a proper statement of the law as to what constitutes settlement under the circumstances of the case at bar:

"Right and justice dictate that a person locating upon the public land should be protected whilst he is making the improvements which, when completed, will give him the actual possession, and that he should have a reasonable time within which to do the necessary work. It may often take weeks or months of diligent work to reduce a tract of public land to actual possession, and whilst diligently pursuing the purpose of reducing it to his possession the locator may at times necessarily be compelled to leave it unoccupied. During such periods, surely, the law should protect him, although if ejected he would not be able to show that he had secured an actual possession. That he had not had a reasonable time after his first location within which to secure such possession, and that he had prosecuted the necessary improvement with due diligence, would be a sufficient answer to the failure to show an actual possession. In such case, if the plaintiff shows that he first entered upon the land, marked the boundaries and diligently made preparations to do those acts necessary to constitue an actual possession, he will be entitled to recover."

Stainінger vs. Andrews, 4 Nevada 59.

See also:

Ritter vs. Lynch, 123 Federal 930-933.
Feirbaugh vs. Masterson, 1 Idaho 135.

It seems to us that there can be no doubt from this testimony that Tincker had initiated a homestead claim to his land and had made a settlement thereon prior to the time that the railroad company filed its first selection in May, 1902.

On March 22nd, 1902, Mr. Thomas R. Benton, on behalf of the railroad company, made his affidavit, that said lands "are vacant, unappropriated, etc." At the very time he made this affidavit, Tincker was upon the land, cutting a trail, and laying the foundation for a cabin. Suppose they had then gone into court to determine who was entitled to the land, the railroad company under its indemnity selection, and Tincker under his homestead claim. Could there be any possible doubt as to who would be awarded the land?

Or to put it another way, if the railroad company in the affidavit accompanying its selection list, had stated the facts as they actually were, namely, that Tincker had in September or October previously gone upon the land, marked the boundaries and exercised other acts of dominion to show a settlement, and that at the time the affidavit was made he was upon the land, cutting a trail and building a cabin, does the Court for one moment think that the land office would have permitted the railroad company to select this land? Clearly this was not such land as the railroad

company could select. It was not vacant and unoccupied. It was not land to which no claim had attached or had been initiated, and therefore the filing of their list gave them no rights whatever in this piece of land.

There is another answer to the petitioner's contention; not only does "the law deal tenderly with one who in good faith goes upon public lands in view of making a home thereon," *Ard vs. Brandon,* 156 U. S. 537, but we contend that the railroad company has no right to raise the question whether this settlement and occupancy was sufficient. In the case of *Kansas Pacific R. Co. vs. Dunmeyer,* 113 U. S., 629, it is said:

"It is not conceivable that Congress intended to place these parties (homestead and pre-emption claimants on the one hand and the railroad company on the other) as contestants for the land, with the right in each to require proof from the other of complete performance of the obligation. Least of all is it to be supposed that it was intended to raise up, in antagonism to all the actual settlers on the soil, whom it had invited to its occupation, this great corporation, with an interest to defeat their claims and to come between them and the Government as to the performance of their obligations."

The petitioner's main contention from the statement in its brief appears to be (Petitioner's Brief page 10) that although Tincker might have settled on the land and initiated a claim, he and his successors in interest

lost their right because Tincker did not follow up his settlement by establishing a residence upon the land. The reasons residence was not established appear in part in Finding of Fact No. 8, Transcript page 33. The land was withdrawn from settlement, entry, sale or other disposal. After it was restored to settlement, it was not subject to entry until notice should be given, and upon the first day that it was open to entry the respondent, Reed, filed upon the land.

But passing the question of Tincker's excuse for not establishing a residence upon the land within a short time after the settlement, it seems to us that the petitioner misses the point of the case. The petitioner does not have the right to quesiton the quality of the settlement of the respondents and their predecessors in interest. That could be done only by the Government. The Government has not questioned it. They have patented to Reed all of the land in his homestead except this one forty. The question here is as to the title the petitioner acquired, and the prime question is: Was this such land as they might select. We think we have clearly shown that it was not such land. A settlement had been made upon it, a claim had attached and had been initiated.

As said in the opinion of the Supreme Court of Washington, *Reed vs. Great Northern Railway Com-*

pany, 126 Wash. 319: "An adverse right indicates and describes a valid and subsisting claim, while the addition of the words 'or claim' indicates something less. We think it broad enough to include a claim of any nature. Manifestly, it was not the intention of Congress to constitute the Railway Company a judge of what claims were valid and what invalid, and, therefore, it extended to the Railway Company the right to select only those lands over which there could be no controversy."

The land was not subject to selection by the Railway Company at the time it filed its list. The fact that its list was on file would give it no right to the land if there should subsequently be a lapse of the settler's rights, unless there should be a new filing by the Railway Company before any other right had attached. The Railway Company subsequently filed a corrected list, but when they filed the corrected list, the respondent, Reed, had built a home upon the property and was living there. We do not believe there was any hiatus in the title of the respondents, but even if there were, under the circumstances of this case, it avails nothing to the petitioner.

In the case of *Northern Pacific Railway Company vs. Trodick,* 221 U. S. 208, cited above, one Lemline settled upon the land in 1877. About 1889 he sold his im-

provements to Trodick, who took possession. The lands had not been surveyed when Lemline settled or when he transferred to Trodick. They were not surveyed until August 10th, 1891. The railroad company making the selection under the indemnity act granting odd numbered sections to the Northern Pacific Railroad Company, filed their map of definite location on July 6th, 1882.

Now note the dates. The railroad company definitely fixes its right on July 6th, 1882, because under the decisions the filing of this map fixed their right to the indemity lands. Lemline was at that time in possession of the land. He subsequently conveyed to Trodick in 1889. The survey of the land was filed in 1891. Up to this time, of course, no application had been made by Trodick or Lemline to enter this land, because no application could be made for the entry of unsurveyed land, but the statute required that a settler upon unsurveyed land must make his application to enter the land within three months after the filing of the plat of survey. Trodick did not apply to enter the land until January 10th, 1896, five and one-half years after the plat was filed and five years and three months after the time had expired under the statute within which he could apply.

"Some reliance is placed on the delay occurring after the survey of the lands before Trodick made his homestead application—the statute of May 14th, 1880, Chapter 89, 21 Stat. at L. 140 U. S. Comp. Stat. 1901, S. 1392, prescribing a certain period within which the homesteader should act after the survey of the lands. But that delay was immaterial as affecting the rights of the homestead applicant, because no rights of others had intervened intermediate the survey and Trodick's formal application. A similar question arose in *Whitney vs. Taylor,* 157 U.S.85, 97,, 39 L. ed. 906, 910, 15 Sup.; Ct. Rep. 976, and it was thus disposed of: 'It is true that Sec. 6 of the Act of 1853 (10 Stat. at L. 245, Chapter 145) provides "that where unsurveyed lands are claimed by pre-emption, the usual notice of such claim shall be filed within three months after the return of the plats of surveys to the land offices." But it was held in *Johnson vs. Towsley,* 13 Wall. 72, 87, 20 L. ed. 483, 488, that a failure to file within the prescribed time did not vitate the proceeding, neither could the delay be taken advantage of by one who had acquired no rights prior to the filing. As said in the opinion in that case (p. 90): "If no other party has made a settlement or has given notice of such intention, then no one has been injured by the delay beyond three months, and if, at any time, after the three months, while the party is still in possession, he makes his declaration, and this is done before anyone else has initiated a right of pre-emption by settlement or declaration, we can see no purpose in forbidding him to make his declaration, or in making it void when made. And we think that Congress intended to provide for the protection of the first settler by giving him three months

to make his declaration, and for all other settlers by saying, if this is not done within three months, anyone else who has settled on it within that time, or at any time before the first settler makes his declaration, shall have the better right." See also *Lansdale vs. Daniels,* 100 U. S. 113, 117, 25 L. ed. 587, 589, where it is said: "Such a notice, if given before the time allowed by law, is a nullity; but the rule is otherwise where it is filed subsequent to the period prescribed by the amendatory act, as, in the latter event, it is held to be operative and sufficient unless some other person had previously commenced a settlement and given the required notice of claim." The delay in filing, therefore, had no effect upon the validity of the declaratory statement.'

"It is not for the railroad company to which was wrongfully issued a patent to make an objection to Trodick's claim which the Land Office would not make. The authorities cited show that the ground assigned by the Commissioner was wholly untenable, as matter of law, in that he assumed that the railroad company acquired an interest in the land by the mere location of the line when Lemline was, at the time, in actual occupancy as a homestead settler."

Northern Pacific Railway Company vs. Trodick, 221 U. S. 208.

To us it seems that the question under consideration is finally determined by the case of *St. Paul M. & M. R. Co. vs. Donohue,* 210 U. S. 21, which has already been referred to. In that case we had the settlement,

and the subsequent filing of a list under the same statute by the Railway Company. The settler then actually executed and filed a formal relinquishment and another person made an entry of the land. The Railway Company contended that upon the filing of the relinquishment, the land was subjeced to the claim of the Railway Company because of its list previously filed. This Court held that such was not the law. The facts in that case cannot be distinguished from the facts in this case, save only that here the settler did not execute a relinquishment, thus making this a stronger case.

The petitioner places much reliance upon the case of *Great Northern Railway Company vs. Hower,* 236 U. S. 702. To us it seems this case can be distinguished from the case at bar. Carter in that case had secured a patent to a quarter section of land. His settlement, residence and improvements were not only not upon the quarter section patented, but they were not even upon contiguous land, as there was an intervening forty acres between his residence and the property claimed. Mr. Justice Day, in the opinion, says: "In this case it appears that the residence was not upon any part of the tract claimed by the homesteader, nor was the residence upon a contiguous tract of land, but was entirely separate and apart from the land claimed."

The question in that case appears to have been whether the settler had maintained such a residence upon the property as to entitle him to a patent. The question here is whether the Railway Company selected land that was open to selection. Our question is not whether Tincker perfected the right to a patent, but the question is: Had he initiated a claim. It does not appear in the Hower case that a claim was ever initiated to the quarter section that was there involved. In the case at bar there is no question that Tincker posted his notices, made his improvements, and took the initial steps of settlement upon the land in question. In due time it was followed by a residence upon the land, which has been followed up now for many years. The Government would not question the sufficiency of the residence and settlement; the Railway Company undertakes to do so.

Certainly the Hower case does not hold that a claim to a homestead may not be initiated by a settlement. It does not hold that a residence must be established as the first act of settlement. It does not hold that a claim having been initiated, the land is open to selection by the Railway Company, but it does hold that if a claim or right is to defeat the selection of a Railway Company it must be a claim to the same land that the Railway Company selects. To us it appears that

settlement is an ultimate fact, the culmination of a series of acts inspired by one purpose. It is initiated by the first act of dominion. One who has ever seen an Indian Reservation opened in the old days knows how it is accomplished. To acquire a patent one must reside upon the land the statutory period of time, but to exempt the land from the right of selection by the Railway Company, it is not necessary that a claimant should have perfected his right to a patent. It is sufficient for him to have initiated a claim, and if at the time the list is filed the claim has been initiated, then the land is not such as may be selected. The land may subsequently be subject to selection by the Railway Company, but the fact that a list is filed when it is not so subject will avail naught to the Railway Company unless it refiles while the land is open to selection. In this case it was filed while it was not subject to selection; when it filed its corrected list it was not subject to selection because Reed resided upon it and therefore the respondents and not the petitioner were entitled to the land.

Respectfully submitted, E. S. McCord
Walter B. Whitcomb

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SUPREME COURT OF THE UNITED STATES.

No. 57.—October Term, 1925.

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Great Northern Railway Company, Petitioner, *vs.* Charles W. Reed, et al. } Writ of Certiorari to Supreme Court of the State of Washington.

[April 12, 1926.]

Mr. Justice Van Devanter delivered the opinion of the Court.

This was a suit in a state court in Whatcom County, Washington, against the Great Northern Railway Company to have it declared a trustee for the plaintiff of the title to a quarter-quarter section of land, theretofore patented to it by the United States, and to compel a conveyance in discharge of the trust. The company in its answer denied much that was alleged in the complaint and sought a decree quieting the title. On the trial the plaintiff prevailed, and the Supreme Court of the State affirmed the decree. 126 Wash. 312.

The suit involved a conflict between a railroad lieu selection and an asserted homestead settlement. The evidence on the material issues was so direct and free from contradiction that the real controversy was over the application of federal statutes to facts conceded or definitely established.

The Great Northern Railway Company is the successor in interest of the St. Paul, Minneapolis and Manitoba Railway Company, which constructed and put in operation certain lines of railroad in the State of Minnesota and the Territory of Dakota and thereby became entitled under an early land grant by Congress to particular lands along those lines. The land officers of the United States denied the company's right to the lands along the lines in Dakota and treated those lands as open to settlement, entry and disposal under the public land laws. In 1890 this Court pronounced the action of the land officers erroneous and sustained the right of the railway company to the Dakota lands. *St. Paul, Minneapolis and Manitoba Ry. Co.* v. *Phelps*, 137 U. S

528. In the meantime many of the lands had come to be occupied and improved by persons who had made entries or purchases of them as public lands under the ruling of the land officers. To correct the resulting wrong to both the company and the individual claimants, Congress by the Act of August 8, 1892, c. 382, 27 Stat. 390, requested the company to relinquish its right to such lands, to the end that the United States might invest the individual claimants with a good title, and declared that the company on executing the relinquishment should be entitled to select and receive other lands in equal quantity. The company complied with that request and thus became entitled as matter of legal right, and not of grace, to select and receive other lands conformably to the terms of the Act. Shortly described, the Act provided that the selections might be made within any of the States "into or through which the railway owned by the said railway company runs"—Washington being one—from the non-mineral, unreserved public lands therein "to which no adverse right or claim shall have attached or have been initiated at the time of the making of such selection"; that not exceeding 640 acres should be selected in a single body; that the mode of selection should be by filing descriptive lists in the land offices for the districts where the selected tracts lay and paying the usual fees of the local land officers; that selection might be made of tracts while yet unsurveyed, in which event they should be described in the list with a reasonable degree of certainty[1] and should be designated according to the survey in a supplemental list within three months after the plat of the survey was filed in the local office; and that on the approval of any list by the Secretary of the Interior[2] the tracts selected therein should be patented to the company.

The railway company selected the quarter-quarter in question May 5, 1902, while it was unsurveyed, by filing a suitable list in the proper local land office and paying the officers' fees; and it duly supplemented that list by another designating the tract according to the survey within a few days after the plat of the survey was filed in the local office, which was on February 6, 1907. The lists were transmitted by the local officers to the General Land Office and laid before the Secretary of the Interior. He

[1]See West v. Rutledge Timber Co., 244 U. S. 90, 98; Rutledge Timber Co. v. Farrell, 255 U. S. 268.

[2]See Weyerhaeuser v. Hoyt, 219 U. S. 380, 387; Payne v. New Mexico, 253 U. S. 367, 370; Wyoming v. United States, 255 U. S. 489, 496.

approved them, and on April 13, 1908, a patent was issued to the company.

The tract was open to selection and was duly selected and rightly patented, if at the time of the selection—May 5, 1902—a homestead claim to the land had not been initiated by the acts about to be stated. The plaintiff contended that such a claim had been initiated, and the courts below so held.

In September or October, 1901, W. J. Tincker, who possessed the qualifications named in the homestead law, went to the quarter section which includes this quarter-quarter, blazed a line around the larger tract, and posted notices at its four corners declaring that he claimed it as a homestead. He was there on that occasion two or three hours. In March,[2] 1902, he went to the quarter section again, blazed a trail from an adjacent stream to the nearest corner, cut a few poles and with these laid what appeared to be a cabin foundation two or three poles high. The trail did not touch the quarter-quarter here in question, nor was the pole foundation placed on it. Tincker was there on that occasion for a longer time than before, probably the greater part of a working day. That is all that was done by him prior to the company's selection. Thereafter he went to the quarter section once or twice a year, usually on hunting trips, but did nothing there beyond renewing his notices at the corners. In August, 1906, he sold his so-called possessory claim and improvements. When he first went to the land and continuously to the time he sold he was residing, with his wife and children, at Maple Falls, a few miles from the land, and was maintaining a home there. At the trial he was a witness for the plaintiff and testified that his intention throughout that period was "to hold" the quarter section, "expecting some day to go up there and live on it."

Tincker sold to W. M. Smithey, who three months later sold to the plaintiff. The last was the only one of the three who made any attempt at establishing a residence on the quarter section. In November, 1906, he did establish a residence on a part of it not here in question; and after the survey he sought and secured a homestead entry on that part at the local land office. He also sought to have the part here in question included in that entry, but failed. 41 L. D. 375. He had no right to have it included unless Tincker's acts prior to the company's selection

[2]He testified: "It was about March as near as I can get at it—between February and May."

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amounted to the initiation of a homestead claim and thereby excepted the tract from the class of lands open to selection.

In the company's selection list and supporting affidavit nothing was said about Tincker's acts, not improbably because the selecting agent knew nothing about them and found nothing on or in the vicinity of the quarter-quarter indicative of a homestead settlement or occupancy. When the plaintiff, in 1907, applied to make his homestead entry and to include this quarter-quarter therein he based his application on his own settlement in November, 1906, and said nothing about a prior claim by Tincker. That was the situation when the patent issued to the company. Afterwards the plaintiff requested that a suit be brought by the United States to cancel the patent on the grounds that the company in making its selection had not disclosed Tincker's acts and that the land officers issued the patent without knowledge of those acts; but the Secretary of the Interior declined to recommend such a suit. The plaintiff brought the present suit in his own right in 1919—eleven years after the issue of the patent, during all of which the company had been regularly paying state and county taxes on the tract.

The homestead law—putting aside special provisions without bearing here—accords to every person of stated qualifications the privilege of acquiring title to a quarter section, or less, of "unappropriated public lands" by settling thereon and continuously residing on, improving and cultivating the same for a prescribed period. The original law was confined to surveyed lands and required that the claims be initiated by an entry made at the local land office, which was to be followed within a reasonable time by actual settlement, residence, etc. Act May 20, 1862, c. 75, secs. 1, 2, 12 Stat. 392; Rev. Stat. secs. 2289, 2290; Act March 3, 1891, c. 561, 26 Stat. 1098. Afterwards a provision was added permitting claims to be initiated, as respects either surveyed or unsurveyed lands, by settlement and providing, where that was done, that record entry should be sought within three months after settlement if the land was surveyed, or, if unsurveyed, within a like period after the survey was made and the plat was filed in the local office. Act of May 14, 1880, c. 89, sec. 3, 21 Stat. 140. The term "settlement" is used as comprehending acts done on the land by way of establishing or preparing to establish an actual personal residence—going thereon and, with reasonable diligence, arranging to occupy it as a home to the exclusion of one elsewhere. The law makes it plain that there must be a definite purpose "in good faith to obtain a

home" by proceeding "faithfully and honestly" to comply with "all the requirements." And the decisions made and instructions issued by the officers charged with its administration show that they uniformly have taken the position that a claim cannot be initiated by asserted acts of settlement which are only colorable and done with a purpose to hold the land for speculation or while maintaining an actual residence elsewhere.[4] The instructions say: "Settlement is initiated through the personal act of a settler placing improvements on the land or establishing a residence thereon. . . . When settlement is made on unsurveyed lands the settler must plainly mark the boundaries of all land claimed. Within a reasonable time after settlement actual residence must be established on the land and continuously maintained."

The decisions of this Court have established the principle that one who, in response to the invitation in the homestead law, actually settles on the public lands in an honest effort to acquire a home should be dealt with leniently and not subjected to the loss of his toil and efforts through any mistake or neglect of the officers or agents of the Government. *Ard* v. *Brandon*, 156 U. S. 537, 543; *Northern Pacific R. R. Co.* v. *Amacker*, 175 U. S. 564, 567; *Tarpey* v. *Madsen*, 178 U. S. 215, 220; *Nelson* v. *Northern Pacific Ry. Co.*, 188 U. S. 108, 123; *Oregon and California R. R. Co.* v. *United States* (No. 1), 189 U. S. 103, 114; *St. Paul, Minneapolis and Manitoba Ry. Co.* v. *Donohue*, 210 U. S. 21, 33. But its decisions also show that this salutary rule does not excuse substantial failures to comply with the requirements respecting the initiation of such a claim or accord to it a preference over other claims lawfully acquired and prior in time. *Maddox* v. *Burnham*, 156 U. S. 544, 548; *Northern Pacific R. R. Co.* v. *Amacker, supra; Weyerhaeuser,*

[4]Amley v. Sando, 2 L. D. 142; McLean v. Foster, 2 L. D. 175; Seacord v. Talbert, 2 L. D. 184; Howden v. Piper, 3 L. D. 162; Witter v. Rowe, 3 L. D. 449; Atterbery's Case, 8 L. D. 173; Fuller v. Clibon, 15 L. D. 231, 233; Northern Pacific R. R. Co. v. Grimes, 24 L. D. 452; Hastings and Dakota Ry. Co. v. Grinden, 27 L. D. 137; O'Brien v. Chamberlin, 29 L. D. 218; Meyer v. Northern Pacific Ry. Co., 31 L. D. 196; Chainey's Case, 42 L. D. 510; Lias v. Henderson, 44 L. D. 542; Instructions of May 25, 1880, 2 Copp's P. L. L. 510; General Circular of March 1, 1884, pp. 11 et seq.; General Circular of January 1, 1889, pp. 13 et seq.; General Circular of January 25, 1904, p. 14; Suggestions to Homesteaders, 37 L. D. 639-640; 40 L. D. 42; 43 L. D. 3; 44 L. D. 93; 48 L. D. 391. And see United States v. Mills, 190 Fed. 513, 516; Bratton v. Cross, 22 Kan. 673; Mosely v. Torrence, 71 Cal. 318; Small v. Rakestraw, 196 U. S. 403.

v. *Hoyt*, 219 U. S. 380, 387, *et seq.*; *Northern Pacific Ry. Co.* v. *Wass*, 219 U. S. 426; *Svor* v. *Morris*, 227 U. S. 524, 527; *Northern Pacific Ry. Co.* v. *Houston*, 231 U. S. 181.

The Supreme Court of the State rightly recognized that the plaintiff's claim was initiated long after the company's selection at the local land office, and therefore that the real question was whether Tincker's asserted acts prior to that selection amounted to the initiation of a homestead claim. If they did the tract in dispute was not subject to selection under the Act of 1892; otherwise it was. The important words of the Act are, public lands "to which no adverse right or claim shall have attached or have been initiated at the time of the making of such selection." The Supreme Court of the State held that Tincker's acts "were not sufficient to initiate a bona fide settlement," but concluded with some hesitation that they nevertheless took the tract out of the class of lands subject to selection.

We agree that Tincker did not make a bona fide settlement and we are further of opinion that his acts fell so far short of such a settlement that they did not amount to the initiation of a claim in any admissible view of the homestead law or the Act of 1892. He did nothing indicative of a present purpose to establish a home on the quarter section. He started no real improvements, made no preparations for living there, did not attempt to reside there and did not take his family there, but confined himself to minor acts calculated merely to deter others from initiating claims. In the seven or eight months preceding the company's selection he was on the land but twice—less than a day each time. His subsequent conduct, if we turn to it, is equally persuasive that he was without a present purpose to make the place a home. He merely visited it once or twice a year, usually on hunting trips, and on those visits only renewed the notices intended to deter others. Considering what he did and his testimony that he was expecting from his first trip in 1901 to his sale in 1906 that "some day" he would go there to live, we think it apparent that his asserted settlement, even if not a myth in his own mind, fell pronouncedly short of satisfying the requirements of the homestead law in respect of the initiation of a claim, and so did not except the quarter-quarter in question from the company's right of selection under the Act of 1892. He endeavored in his testimony to attribute his omissions to a temporary withdrawal of the land and the surrounding area

pending an inquiry as to whether they should be included in an existing forest reserve. But that withdrawal—it later was revoked—could not have been a factor in the matter, because the withdrawal order when produced in evidence disclosed that it was made more than a year after his asserted settlement and more than six months after the company's selection, and that it contained a provision declaring that bona fide settlements and valid claims were not affected by it.

If while maintaining a home at Maple Falls Tincker could initiate a homestead claim by acts such as are disclosed here, and thus hold the land against others desiring to initiate claims, the way was open for him similarly to make a colorable appropriation of many tracts in that timber region and thus to exact tribute from intending settlers and claimants. His acts, if effective against the company's right of selection, would be equally an obstacle to the initiation of homestead settlement claims, which is admissible only in respect of unappropriated public lands.

The state court regarded its conclusion as deriving some support from cases in this Court; but we think the cases cited are not susceptible of that interpretation. All are cases where the individual claim which operated to defeat the railroad claim or selection was prior in time and had been initiated either by an entry at the land office or by an actual bona fide settlement. *Kansas Pacific Railway Co.* v. *Dunmeyer*, 113 U. S. 629, and *St. Paul, Minneapolis and Manitoba Ry. Co.* v. *Donohue*, 210 U. S. 21, are typical of all. In both a homestead claim prior in time was involved. In the first it had been initiated by an entry at the land office, and in the second by actual settlement and occupancy in good faith. In both it was in existence when the right of the railroad company became fixed, if fixed at all; and the ruling was that such a claim existing at that time excepted the land—from the company's grant in one case and from its right of lieu selection in the other—and that a susequent abandonment, relinquishment or failure to comply with the law on the part of the homestead claimant neither obviated the exception nor entitled the company to the land—under the grant in one case and the selection in the other. We perceive nothing in either case which makes for the view that acts which fall far short of initiating a claim, in either mode, work such an exception.

The selection in *St. Paul, Minneapolis and Manitoba Ry. Co.* v. *Donohue* was under the Act of 1892, now before us, and was of

unsurveyed land. When it was made a qualified claimant, who had settled theretofore and given notice of the extent of his claim, was residing on, occupying and improving the land and in good faith conforming to the homestead requirements. Subsequently he died, and his mother as sole heir sold his possessory claim and improvements to Donohue, who made a timber and stone entry of the land after the survey. This Court, after carefully pointing out that the homestead claim was lawfully initiated, held that the land was excepted from the right of selection and therefore that the selection was of no avail. Most of the discussion in the opinion was to no purpose if, as is contended here, it was immaterial whether the homestead claim was initiated in substantial conformity to the homestead requirements.

A selection of unsurveyed land under the same Act was involved in *Great Northern Ry. Co.* v. *Hower,* 236 U. S. 702, and was sustained against an asserted prior homestead claim on the ground that, while the claimant had put a small barn on the tract and had cut a trail across it prior to the selection, he had never resided thereon or shown any purpose to do so, but had been maintaining a home on other land not even contiguous to it.

The *Donohue* case and the *Hower* case taken together illustrate the principle of prior cases and show how it should be applied here.

Decree reversed.

A true copy.

Test:

Clerk, Supreme Court, U. S.